86 1841

No. 86-

Supreme Court, U.S.
FILED
MAY 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SUNSHINE BISCUITS, INC.,
Petitioner,

vs.

KAY APPONI, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

DAVID S. CUPPS
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400
Counsel for Petitioner

Of Counsel:

DONALD I STRAUBER
THOMAS E. BEZANSON
AUDREY KEVY WILNER
CHADBOURNE & PARKE
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5100
Attorneys for Petitioner Sunshine Biscuits, Inc.

QUESTIONS PRESENTED FOR REVIEW

1. Whether an action under Section 301 of the Labor Management Relations Act which arises out of collective bargaining, but is not pleaded as a hybrid action and not specifically addressed in *DelCostello,* is subject to the six month statute of limitations arising under federal labor law?

2. In an action under Section 301 of the Labor Management Relations Act, did the court below err in applying a general state statute of limitations governing actions for simple breach of contract to an action based upon oral statements made during collective bargaining negotiations?

PARTIES TO THE PROCEEDING

The sole parties to the proceeding are the class of persons represented by the named Respondent and the single Petitioner as set forth in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDING i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISION INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 8

I. The Decision Of The Sixth Circuit Stands For The Circuit Courts' Inconsistent And Conflicting Application Of The Statute Of Limitations In Actions Arising Under Section 301 Of The Labor Management Relations Act 8

II. Actions Under Section 301 Should Be Governed By The Most Appropriate Federal Limitations Period 14

III. A State Statute Of Limitations Governing Simple Breach Of Contract Actions Is Inappropriate To A Claim Rooted In The Formation Of Mutual Obligations Allegedly Created In The Process Of Federally Mandated Collective Bargaining 15

CONCLUSION 16
APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) . . . 15

Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210 (6th Cir. 1987) (*"Apponi II"*) 1-2, 5, 11, 13

Apponi v. Sunshine Biscuits, Inc., 652 F.2d 643 (6th Cir. 1981) (*"Apponi I"*) 1-2, 4

Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 8, 10-13, 16

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 5, 8-17

Derwin v. General Dynamics Corp., 719 F.2d 484 (1st Cir. 1983) 12

Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp., 736 F.2d 896 (3d Cir. 1984) 10

Garcia v. Eidal International Corp., 808 F.2d 717 (10th Cir. 1986) 13

Humphrey v. Moore, 375 U.S. 335 (1964) 9

International Association of Machinists v. Allied Products Corp., 786 F.2d 1561 (11th Cir. 1986) 10

International Union of Electrical, Radio and Machine Workers v. Ingram Mfg. Co., 715 F.2d 886 (5th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984) . . 12

International Union of Elevator Constructors v. Home Elevator Co. Inc., 798 F.2d 222 (7th Cir. 1986) 12

Lacine v. G-K Trucking, 802 F.2d 1190 (9th Cir. 1986) 11

TABLE OF AUTHORITIES—Continued

Page

McCreedy v. Local Union No. 971, 809 F.2d 1232 (6th Cir. 1987) 11

Monarch Long Beach Corp. v. Soft Drink Workers, Local 812, International Brotherhood of Teamsters, 762 F.2d 228 (2d Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 569 (1985) 13

Samples v. Ryder Truck Lines, Inc., 755 F.2d 881 (11th Cir. 1985) 11-12

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 14

Teamsters Union Local 315 v. Great Western Chemical Co., 781 F.2d 764 (9th Cir. 1986) 10

STATUTORY PROVISIONS

29 U.S.C. §160(b) 8, 10-11, 15-16

29 U.S.C. §185(a) 2, 5, 8-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

SUNSHINE BISCUITS, INC.,

Petitioner,

vs.

KAY APPONI, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

Petitioner Sunshine Biscuits, Inc. ("Sunshine")[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which reversed and remanded the decision of the United States District Court for the Southern District of Ohio entering final judgment in favor of Respondents.

OPINIONS BELOW

The Sixth Circuit's opinion in respect of the judgment for which Sunshine seeks review herein, *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987) ("*Apponi II*"), is set forth in the Appendix, as are the Sixth Circuit's order denying rehearing, the Sixth Circuit's initial opinion in this matter, *Apponi v. Sunshine Biscuits, Inc.*, 652 F.2d

---

[1]Sunshine Biscuits, Inc. is a wholly-owned subsidiary of American Brands, Inc.

643 (6th Cir. 1981) ("*Apponi I*"), the Sixth Circuit's January 20, 1984 order dismissing the parties' interlocutory appeals, the District Court's two final judgments and orders, and the district court's July 6, 1983 order from which the parties filed interlocutory appeals.

JURISDICTION

The judgment of the Court of Appeals in *Apponi II* was entered on January 15, 1987. Sunshine timely petitioned for rehearing, which petition was denied on February 20, 1987. This petition for a writ of certiorari was filed within ninety days thereafter. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The federal statute involved in this case is Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), which is set forth, in full, below.

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. *Nature of the Case*

This is an action by certain former employees (the "Respondents") against their former employer, Sunshine. The Respondents were employed at Sunshine's bakery in Dayton, Ohio, until 1972, when the bakery was closed, the

Dayton employees' unions and Sunshine reached closing agreements, and Respondents' employment by Sunshine ended. Respondents claim they are entitled to the early retirement benefits described in the Sunshine Pension Plan (the "Pension Plan") which was in effect in 1972 and, in lieu of present or future participation in the Pension Plan, seek lump-sum damage awards.

B. *Course of Proceedings*

This action was instituted on November 29, 1977. Plaintiffs' Amended Complaint, filed on December 16, 1977, alleged various claims including breach of contract, common law fraud and securities fraud. The District Court, finding that relevant state-law statutes of limitations had run, granted Sunshine's motion to dismiss all claims save the breach of contract claim.

The District Court thereafter certified a class composed of 211 former employees.[2] On the parties' cross-motions for summary judgment, the District Court dismissed the breach of contract claim on the ground that the Pension Plan was unambiguous in granting early retirement benefits only to employees who had 15 years of continuous service at Sunshine *and* were at least 55 years old when they left Sunshine's employ. (Order, June 8, 1979.) Because each of the Respondents was under 55 when the Dayton bakery closed, the District Court entered final judgment in favor of Sunshine.

---

[2]The class consists of "all former employees of Sunshine Biscuits, Inc., employed at the Dayton plant thereof who prior to April 30, 1972, had completed at least fifteen years of continuous service and had not by April 30, 1972, attained the age of 55 years." (Order, June 20, 1978 at 3). The Court of Appeals held that the class is properly limited to those persons who were members of the Bakery and Confectionery Workers' International Union of America, Local 310.

Respondents appealed. In *Apponi I*, the Court of Appeals affirmed the District Court's holdings concerning the bar of statutes of limitations, but held that issues of fact precluded final disposition of the contract claim on summary judgment and remanded the action for trial on the related doctrines of waiver and estoppel. *See* 652 F.2d at 649-50.

The District Court conducted a five-day trial in September of 1982. At the conclusion of the trial, the trial court submitted a single factual question to the jury for its determination:

> Do you find that agents of Sunshine Biscuits, Inc. advised representatives of Local Union 310 that an employee with fifteen years of service would receive a pension at age 55 whether the Dayton bakery was open or not?

The jury found that agents of Sunshine had made such statements. The District Court treated the jury's special finding of fact as a general verdict imposing liability and, in July, 1983, adopted a Special Master's report and recommendation establishing a lump sum damage award against Sunshine.

Sunshine and the Respondents appealed the July 1983 order. On January 20, 1984, the Court of Appeals dismissed Sunshine's appeal and Respondents' cross-appeal and remanded the action to the District Court for a "final decision on the issue of the lump sum damage awards . . . " (Order, January 20, 1984).

The District Court again referred the action to the Special Master. The District Court adopted the Special Master's second report and ordered Sunshine to pay $3,032,158.43 into court. The District Court declined to

apply the six month statute of limitations to bar Respondents' claims and from that final judgment, Respondents and Sunshine appealed.

On appeal, Sunshine argued, *inter alia*, that this action necessarily arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, inasmuch as it arises from Sunshine's purported obligations under a collectively bargained pension plan or directly out of the collective bargaining process itself. The Court of Appeals, while unanimously agreeing with that fundamental proposition of law, did not accept Sunshine's further argument that this 301 action was time-barred by the six month statute of limitations established by this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Instead, the Court of Appeals resorted to what it described as the most analogous state statute of limitations—either the six year statute for breach of oral contract or the fifteen year statute for breach of written contract. *See* 809 F.2d at 1216. It is on the basis of that portion of the Sixth Circuit's opinion in *Apponi II* that Sunshine petitions this Court for a writ of certiorari.

C. *Statement of Facts*

Prior to 1968, Sunshine established an employer-funded Pension Plan applicable to hourly employees at all of Sunshine's facilities in the United States. For employees who qualified, the Pension Plan provided, among other benefits, a reduced benefit upon early retirement at or after age 55.

In 1968, representatives of Respondents' local union, Bakery and Confectionery Workers' International Union of America, Local 310 ("Local 310"), in the course of negotiating a two year collective bargaining agreement with

Sunshine, sought concessions regarding pension benefits. When the 1968 negotiations concluded and the members of Local 310 ratified the new agreement, there was no language in the agreement modifying the Pension Plan and no new language added to the Pension Plan itself. Sunshine's position at trial was that its negotiators had uniformly rejected Local 310's proposals for changes to the Pension Plan on the grounds that the Pension Plan was a matter of company policy and Sunshine would not consent to local variations in a nationwide Pension Plan. (See, *e.g.*, Triplett Tr. at 97) Respondents' position was that one of Sunshine's negotiators had said the Pension Plan, as it stood in 1968, provided unspecified vested benefits after 15 years of continuous service.[3]

In the 1970 collective bargaining, Local 310 again sought concessions from Sunshine regarding pension benefits. When the 1970 collective bargaining agreement was approved by the members of Local 310, neither it nor the Pension Plan had new language concerning vested pension benefits.

---

[3]Gean Triplett, who participated in the 1968 and 1970 negotiations with Local 310 in his capacity as a Vice-President of the international union, testified (Triplett Tr. at 68) concerning the 1968 negotiations:

> A. I asked John Wilson [Sunshine's negotiator] if they had vesting.
>
> Q. What was his response?
>
> A. He says that's what it says, and he repeated this. He said all employees with 15 years or more of service at the age of 55 may get a reduced pension, and we carried it on further. I asked him, frankly, give it to me. Are these people with 15 years of service going to get a pension. He said that they would. I says in other words we got vesting. He says that's what it [the Pension Plan] says . . . .

Early in 1972, agents of the Food and Drug Administration ("FDA") found traces of Ronnel, a pesticide, in certain products produced at Sunshine's Dayton bakery and instituted litigation to enjoin further production. In response, Sunshine undertook an extensive clean-up operation, expending hundreds of thousands of dollars, in an effort to obtain FDA approval for the resumption of manufacturing. (Griffin Tr. at 45-48) The employees and their unions, including Local 310, also made significant efforts to resolve the conflict between the FDA and Sunshine. (Griffin Tr. at 44-48) All of those efforts were unsuccessful and in June of 1972 Sunshine announced that the Dayton bakery was permanently closed. (Griffin Tr. at 50)

Thereafter, all of the unions and management met and negotiated the impact of the closing. Each union member was notified that the plant was closing and was informed, by letter, of individual exit interviews at the plant. At those exit interviews, Sunshine gave each departing employee a severance check and a sheet that specified the amounts of severance pay and pension benefits to which he or she was entitled. Those employees who had qualified for pensions found that their severance checks were reduced by a portion of the pension benefits to which they were entitled. Those employees who were not entitled to receive a pension received a lump sum severance check. The exit interview sheet for each departing employee under age 55 disclosed that he or she would receive no pension. Of those exit interviews, Mrs. Apponi, the named Respondent, later said, "We went in to pick up our severance checks. And that's when we all found out we had no pension." (DX BW)

Despite the fact that the Respondents' collective bargaining agreement contained provisions setting forth in

detail the process by which union members could file grievances and seek arbitration, none of the Respondents sought to grieve or otherwise protest the absence of pensions. Instead, over five years later the complaint in this action was filed in the United States District Court for the Southern District of Ohio, at Dayton.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Sixth Circuit Stands For The Circuit Courts' Inconsistent And Conflicting Application Of The Statute Of Limitations In Actions Arising Under Section 301 Of The Labor Management Relations Act

This action presents the issue left unanswered by this Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), in which it was held that hybrid breach of contract/breach of duty of fair representation cases under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a), are governed by the six month statute of limitations period set forth in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). While the decision in *DelCostello* has laid to rest the statute of limitations question in the textbook hybrid action under Section 301, some courts have read *DelCostello* as not expressly addressing the appropriate statute of limitations to apply in a non-hybrid action arising under Section 301. Among, and even within, the Courts of Appeals, confusion reigns. The relationship between *DelCostello* and *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.7 (1966), wherein the Court noted, "(w)hether other §301 suits different from the present one might call for the application of other rules on timeliness, we are not requested to decide, and we indicate no view

whatsoever on that question," has resulted in a maze of appellate decisions with no readily discernible pattern. This case presents the Court with an opportunity to guide the courts and litigants in this extremely important issue in federal labor law.

In holding that hybrid Section 301 actions are governed by a six month federal statute of limitations the Court noted in *DelCostello*:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy.

The Court, however, qualified that pronouncement:

> Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn from state law . . . As Justice Goldberg cautioned: "(I)n this court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process." *Humphrey v. Moore*, 375 U.S. 335, 358 (1964) (opinion concurring in result).

462 U.S. at 171, 172. Furthermore, as the majority noted,

> . . . The suits at issue here, of course, are amalgams, based on both an express statutory cause of action and an implied one . . . .We need not address whether, as a general matter, such cases should be treated differently; even if this action were considered as arising solely under §301 of the Labor Management Relations Act, 29 U.S.C. §185, the objections to use of state law and the availability of a well-suited limitations period in §10(b) would call for application of the latter rule.

462 U.S. at 159 n.12.

Despite the Court's language quoted above, the Courts of Appeals of the various Circuits have diverged, and are in direct conflict, regarding the applicability of *DelCostello* to those frequent situations in which a less than pristine hybrid action is brought under Section 301. Indeed, there is even a split of authority *within* the Sixth Circuit. In short, the lower federal courts and the litigants in those courts are in need of guidance from this Court.

Several Courts of Appeals have read *DelCostello* to require the application of a six month statute of limitations to non-hybrid Section 301 actions. Relying on *DelCostello,* the Third Circuit, the Ninth Circuit and the Eleventh Circuit have applied the *federal* six month statute of limitations to Section 301 actions brought by unions seeking to compel arbitration against contracting employers. *International Association of Machinists v. Allied Products Corp.,* 786 F.2d 1561 (11th Cir. 1986), *Teamsters Union Local 315 v. Great Western Chemical Co.,* 781 F.2d 764 (9th Cir. 1986), and *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp.,* 736 F.2d 896, 901 (3d Cir. 1984) ("The only clear signal that can be read from footnote 12 in *DelCostello* is that the applicability of

Hoosier Cardinal to pure Section 301 suits is now an open question.")

Indeed, the Sixth Circuit has expressly followed the foregoing decisions from the Third, Ninth and Eleventh Circuits in *McCreedy v. Local Union No. 971,* 809 F.2d 1232 (6th Cir. 1987). *McCreedy* applied the six month federal statute of limitations in a non-hybrid Section 301 action despite the fact that only eight days earlier a different panel of the same court had decided *Apponi II,* holding that the *state* breach of contract statute of limitations should be applied in that particular non-hybrid Section 301 action.

The Eleventh Circuit applied *DelCostello* to preclude prosecution of an action brought by a union to enforce an arbitration award. *Samples v. Ryder Truck Lines, Inc.,* 755 F.2d 881 (11th Cir. 1985). While ruling that the action was technically a hybrid action, the court went on to say that the "claim would be time-barred (under *DelCostello*) whether it were characterized as a straightforward Section 301 suit or a hybrid claim." *Id.* at 887.

Similarly, in an action brought by a group of employees against their former employer alleging that the employer's closing of a facility had violated the terms of a collective bargaining agreement, the Ninth Circuit, in *Lacine v. G-K Trucking,* 802 F.2d 1190, 1191 (9th Cir. 1986), citing *DelCostello,* unequivocally declared:

> The six-month statute of limitations for unfair labor practices contained in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), applies in Section 301 actions.

The foregoing decisions are clear evidence that the federal Courts of Appeals have applied *DelCostello* in a

variety of procedural postures and factual scenarios. Those courts have apparently concluded that *DelCostello* severely limited the application of *Hoosier Cardinal* to actions arising under federal labor law. The strong policy of establishing a uniform federal labor law has resulted in the application of *DelCostello's* six month statute of limitations in those Section 301 cases.

In contrast, several other federal appellate courts have read *DelCostello* narrowly and, in reliance on *Hoosier Cardinal,* applied state statutes of limitations to Section 301 actions. For example, in a Section 301 action filed by a union alleging breach of a collective bargaining agreement, the Seventh Circuit applied the "most appropriate" state statute of limitations for breach of contract actions. *International Union of Elevator Constructors v. Home Elevator Co., Inc.,* 798 F.2d 222 (7th Cir. 1986). The court skirted *DelCostello* and pronounced itself bound by *Hoosier Cardinal.* This decision, of course, directly contradicts the holdings in other "straightforward" Section 301 cases which held that *DelCostello* was applicable.

The Fifth Circuit decision in *International Union of Electrical, Radio and Machine Workers v. Ingram Mfg. Co.,* 715 F.2d 886 (5th Cir. 1983), *cert. denied,* 466 U.S. 928 (1984), applying a state statute of limitations to an action seeking to enforce an arbitrator's award is in direct conflict with *Samples v. Ryder Truck Lines, Inc., supra,* which held that *DelCostello* required the application of the six month federal statute of limitations to the identical situation. *Derwin v. General Dynamics Corp.,* 719 F.2d 484 (1st Cir. 1983), also applied a state statute of limitations to an action to enforce an arbitrator's award, despite *DelCostello.*

Recently, the Tenth Circuit refused to apply *DelCostello* to even a hybrid case. *Garcia v. Eidal International Corp.*, 808 F.2d 717 (10th Cir. 1986). The appellate court reasoned that because the employer allegedly repudiated the collective bargaining agreement, the action, therefore, was more similar to a breach of contract action than a hybrid action. Accordingly, the court held that *DelCostello* was not applicable.[4]

Finally, the Sixth Circuit Court of Appeals in *Apponi II*, has reverted to the teachings of *Hoosier Cardinal* and applied Ohio statutes of limitations applicable to simple breach of contract actions to litigation brought by union members seeking to establish the existence of contractual benefits bestowed as a result of statements made in collective bargaining negotiations.

In seeking a writ of certiorari, Petitioner submits that the disparity of and conflicts in opinion among—and even within—the Circuit Courts of Appeals regarding the limitations and/or broader import of *DelCostello*, confusion inexorably intertwined with the continued evolution of a federal common law of labor relations, requires resolution. This case presents a compellingly appropriate vehicle for this resolution.

---

[4]*Cf., Monarch Long Beach Corp. v. Soft Drink Workers, Local 812, International Brotherhood of Teamsters*, 762 F.2d 228, 231 (2d Cir. 1985) ("*DelCostello* should be narrowly construed. The particularized circumstances of the hybrid Section 301/duty of fair representation suit . . . demarcate the limits of *DelCostello's* reach."), *cert. denied*, _____ U.S. _____, 106 S. Ct. 569 (1985).

II. Actions Under Section 301 Should Be Governed By The Most Appropriate Federal Limitations Period

Since the National Labor Relations Act became law, this Court has guided the evolution of the federal common law of labor relations. Chief among the foundations of this growing structure of principles is the need for national uniformity and the recognition that traditional rules of common law must be tempered by the realities of the collective bargaining arena. Consistently with this evolution, *DelCostello* teaches that a state statute of limitations governing actions for simple breach of contract rarely provides an appropriate analogy for an action brought under Section 301. The necessary corollary to such an observation is, more often than not, resort to a nationally applicable federal statute of limitations will best effectuate implementation of a national labor policy.

As "more than a contract" and as a "generalized code to govern a myriad of cases which the draftsman cannot wholely anticipate," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), a collective bargaining agreement can rarely be expected to generate those sorts of contractual disputes resolved by state courts under common law principles. *DelCostello* itself, as well as the hundreds of decisions in which the courts have wrestled with its result, is amply demonstrative of this truism; the decision of the Court of Appeals in the instant case provides reinforcement. The dramatic increase in the rate at which the federal judiciary is being required to deal with Section 301 actions underscores the need for more precisely defined and nationally uniform parameters for deciding questions of timeliness.

This Court's decision in *DelCostello,* if not read as being applicable only in classic hybrid actions, provides the needed guidance. The Courts of Appeals for the First Circuit, Second Circuit, Fifth Circuit, Seventh Circuit and Tenth Circuit read such an unnecessary limitation into *DelCostello;* the Courts of Appeals for the Third Circuit, Ninth Circuit and Eleventh Circuit, on the other hand, see no such limitation. In fact, the Sixth Circuit has reached inconsistent results on this very point. This divergence presents a conflict ripe for resolution by this Court. The decision in *DelCostello* should not be read as being limited solely to pure hybrid actions—Section 10(b) of the National Labor Relations Act contains the limiting period to which a court should now first look in a Section 301 action.

III. A State Statute Of Limitations Governing Simple Breach Of Contract Actions Is Inappropriate To A Claim Rooted In The Formation Of Mutual Obligations Allegedly Created In the Process Of Federally Mandated Collective Bargaining

As this Court has recognized, " . . . questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement . . . " require the application of a uniform federal law for resolution. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211 (1985). Even as recognized in *Hoosier Cardinal,* questions involving the formation of a collective bargaining agreement are particularly amenable to resolution under a federal common law of labor.

In the instant case, should the decision of the Court of Appeals be allowed to stand, this matter will proceed to trial on the question whether, under "common law" principles of waiver and/or estoppel, statements made during

collective bargaining negotiations in 1968 and in 1970 created collectively bargained obligations outside the resulting collective bargaining agreements. If that trial takes place, the trial court will be required to temper and adapt those venerable doctrines in order to reflect the realities of the workplace (and of the bargaining table) under Congress' statutory scheme. How such a task is to be accomplished, while hardly at issue here, vividly illustrates that there can be no realistic comparison of this litigation to traditional state law contract claims. Surely, it can hardly be said that this action "closely resembles an action for breach of contract cognizable at common law." *Hoosier Cardinal* at 705 n.7.

To the contrary, the issue here involves—indeed pivots upon—"those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlements of disputes under it." *Hoosier Cardinal* at 702. While the fact that certain statements were made is no longer at issue, their import, their contexts, their understanding and their effects must necessarily be interpreted in the atmosphere of the collective bargaining process. Therefore, the Court of Appeals' reliance on Ohio's statute of limitations under the principles of *Hoosier Cardinal* is misplaced and the six month statute of limitations of §10(b) under *DelCostello* should be applied.

CONCLUSION

Under *DelCostello v. Teamsters*, the six month statute of limitations set forth in §10(b) of the National Labor Relations Act applies to actions under Section 301 and is not limited to hybrid cases. The Court of Appeals' decision herein is contrary to this Court's decision in *DelCostello*

and is in conflict with several recent, well-considered decisions from other Circuit Courts of Appeals. Petitioner respectfully requests that a writ of certiorari be granted and that the decision of the Sixth Circuit be reversed.

Respectfully submitted,

DAVID S. CUPPS
VORYS, SATER, SEYMOUR
AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

Counsel for Petitioner

Of Counsel:

DONALD I STRAUBER
THOMAS E. BEZANSON
AUDREY KEVY WILNER
CHADBOURNE & PARKE
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

Attorneys for Petitioner
Sunshine Biscuits, Inc.

[This Page Intentionally Left Blank]

APPENDIX

[This Page Intentionally Left Blank]

Nos. 85-3782 & 85-3783

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KAY APPONI, et al.,
CLASS ACTION,
Plaintiffs-Appellees, Cross-Appellants,

v.

SUNSHINE BISCUITS, INC.,
Defendant-Appellant, Cross-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 15, 1987

Before: WELLFORD and MILBURN, Circuit Judges; and DeMASCIO, District Judge*

MILBURN, Circuit Judge. Plaintiffs appeal and defendant cross-appeals from the district court's judgment for plaintiffs in this action to recover retirement benefits pursuant to a collectively-bargained pension plan. For the reasons that follow, we reverse in part and remand.

---

*Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

I. FACTS

A. *Procedural Facts*

Plaintiffs, former employees of Sunshine Biscuits, Inc. ("Sunshine") who had accumulated at least fifteen years of continuous service but were not fifty-five years of age in 1972 when Sunshine closed its Dayton, Ohio, bakery, brought this action on November 29, 1977, against defendant Sunshine seeking to recover early retirement benefits described in Sunshine's pension plan. Plaintiffs' amended complaint, filed December 16, 1977, alleged breach of contract, common law fraud, and securities fraud.

The district court dismissed the fraud claims, holding that the relevant statutes of limitations had run. Thereafter, the district court held that the pension plan granted early retirement benefits only to employees who had fifteen years of continuous service at Sunshine and were at least fifty-five years of age when they left Sunshine's employ. Because each plaintiff was under fifty-five years of age when Sunshine's Dayton Bakery closed, the district court granted summary judgment for Sunshine on the contract claim thereby dismissing the case.

In a prior appeal, this court affirmed the district court's dismissal of the fraud claims, but reversed the district court's grant of summary judgment on the breach of contract claim. *Apponi v. Sunshine Biscuits, Inc.*, 652 F.2d 643, 649-50 (6th Cir. 1981) ("*Apponi I*"). This court, although declining to rule on the proper interpretation of the pension plan, determined that representations regarding plaintiffs' rights to retirement benefits allegedly made by Sunshine's negotiators during negotiations concerning the pension plan gave rise to "triable issues of fact" under the equitable doctrines of estoppel and waiver. 652 F.2d at 649-50. The court reversed and remanded "for a jury trial as to whether the company made the representations alleged." 652 F.2d at 650-51.

On remand, the district court excluded all evidence not relevant to whether the representations were made and submitted a single factual issue to the jury for its determination: "Do you find that agents of [Sunshine] advised representatives of [plaintiffs' union] that an employee with 15 years of service would receive a pension at age fifty-five whether the Dayton Bakery was open or not?" The jury found that Sunshine's agents had made the representations.

The district court then referred the matter to a special master for determination of the amount due each plaintiff. Plaintiffs and defendant stipulated that any pension benefits found to be due would be paid as lump sums. The district court adopted the first report of the special master which calculated a monthly pension benefit for each plaintiff, and plaintiffs and Sunshine appealed. This court dismissed the appeals and remanded for a "final decision on the issue of lump sum damage awards." On remand, the district court again referred the action to the special master. The district court then adopted the second report of the special master which determined the lump sum awards and ordered Sunshine to pay $3,032,158.43 into the court.

B. *Historical Facts*

Prior to 1968, Sunshine established an employer-funded pension plan applicable to hourly employees at all of Sunshine's facilities in the United States. For employees who qualified, the pension plan provided full benefits upon retirement at or after age sixty-five, lesser benefits on early retirement at or after age fifty-five, and minimum benefits for retirement caused by disability at or after age forty-five.

In 1968, representatives of plaintiffs' union, Bakery and Confectionary Workers' International Union of America, Local 310 ("Local 310"), in the course of negotiating a two-year collective bargaining agreement with Sunshine, sought vesting of benefits on the basis of years of service only. Local 310's list of proposals included:

> Pension: The members will receive the following: job vesting regardless of age, for example: a man with twenty-five years of service, age 42, can leave the industry (bakery) forever and at age 55 receive a reduced pension the rest of his life (without ever returning to work).
>
> For example: a man with fifteen years of service at age 32 or more may leave the industry (bakery) forever and receive a reduced pension at age 55 (without ever returning to work).

Witnesses for plaintiffs stated in affidavits and testified at the trial that Sunshine's negotiators' response to the proposal was that the pension plan, as it stood in 1968, provided for vesting of benefits after fifteen years of continuous service.

In the 1970 collective bargaining negotiations, Local 310 again sought vesting of pension benefits on the basis of years of service only. The union's list of proposals included a proposal and an example which were identical to that made in 1968 as quoted above. Witnesses for plaintiffs stated in affidavits and testified at the trial that Sunshine's negotiators again responded that the pension plan, as it stood in 1970, provided for vesting of benefits after fifteen years of continuous service.

Neither the 1968 negotiations nor the 1970 negotiations resulted in any change in the collective bargaining agreement or the pension plan concerning vesting of pension benefits. The key provision of the pension plan involved is paragraph 23, which provides: "An employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service."

In June 1972, Sunshine closed the Dayton Bakery because it could not comply with the Food and Drug Administration's requirements. Each union member was notified that the plant was closing and was informed of individual exit interviews at the plant. At those exit interviews, Sunshine gave each

departing employee a sheet specifying the amount of pension benefits to which each employee was entitled. The exit interview forms for employees under age fifty-five showed no presently payable pension benefits.

II. SUNSHINE'S CROSS-APPEAL

A. *Pre-emption*

Sunshine argues that because plaintiffs' action arises out of Sunshine's purported obligations under a collectively-bargained pension plan or directly out of the collective bargaining process itself, it necessarily arises under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. This argument was not raised in Sunshine's answer nor presented to the prior panel. Ordinarily, "a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278, at 339 (1969). Section 301, however, expresses a compelling policy in favor of uniform application of federal law in actions to enforce labor contracts, and, therefore, we decline to apply the waiver rule. *See National Metalcrafters v. McNeil*, 784 F.2d 817, 825-26 (7th Cir. 1986).

Section 301 provides that the federal courts have jurisdiction in "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between any such labor organizations." 29 U.S.C. § 185(a). Section 301 not only confers on federal courts jurisdiction in actions involving enforcement of labor contracts but also authorizes the federal courts to fashion the substantive law to be applied in suits under section 301. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). In fashioning federal substantive law, federal courts may resort to state law if it is compatible with federal labor policy. *Id.* at 457. However, inconsistent state law must give way to principles of federal labor law.

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

The scope of the pre-emptive effect of section 301 was recently clarified by the Supreme Court in *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985). There, an employee brought an action against his employer, who was responsible for administering a non-occupational disability insurance plan under the collective bargaining agreement, alleging bad faith in the handling of his claim. The Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 1916 (citation omitted). The Court reasoned:

> If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective-bargaining] agreement" be defined by an application of "an evolving federal common law grounded in national labor policy." . . . Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 1911 (quoting *Bowen v. United States Postal Service*, 459 U.S. 212, 224-25 (1983)).

The term "contracts," as used in section 301, is not limited to collective bargaining agreements but includes other agreements between employers and labor organizations. *Retail Clerks International Association, Local Union Nos. 128 and*

633 v. Lion Dry Goods, Inc., 369 U.S. 17, 26-28 (1962); *Whelan v. Colgan*, 602 F.2d 1060, 1061 (2d Cir. 1979). Collectively-bargained pension plans are "contracts" for the purposes of section 301. *Rehmar v. Smith*, 555 F.2d 1362, 1367 (9th Cir. 1977); *see also International Union, UAW v. Textron, Inc.*, 312 F.2d 688, 690-91 (6th Cir. 1963). Here, plaintiffs' claims arise from Sunshine's purported obligations under the collectively-bargained pension plan. Therefore, the holding in *Allis-Chalmers* requires that plaintiffs' claims be treated as section 301 claims.

B. *Statute of Limitations*

Sunshine argues that plaintiffs' claims under section 301 are barred by the six-month statute of limitations established by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). It is the law of the case that plaintiffs' cause of action against Sunshine accrued "not later than 1972 when the company shut down its Dayton Bakery." *Apponi I*, 652 F.2d 650 n.10. Thus, if the six-month statute of limitations is applicable here, plaintiffs' claim, filed in 1977, is time-barred.

However, in *DelCostello* the Court held that the six-month statute of limitations period of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), is applicable to hybrid section 301/fair representation actions. The Court limited its holding to the so-called hybrid action against both employer and union, distinguishing rather than overruling *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), which applied the state limitations period for breach of contract actions to an action by a union alleging a breach of the collective bargaining agreement. Thus, federal courts may still resort to the most analogous state statute of limitations where, as here, the action does not implicate the breach of the union's duty of fair representation. *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, Nos. 84-5518 & 84-5868, slip op. at 18 (6th Cir. September 2, 1986) (en banc).

Sunshine argues that the most analogous Ohio statute of limitations is either the two-year period applicable in actions alleging bodily injury or injury to personal property, Ohio Rev. Code § 2305.10, or the four-year period applicable to other tort actions, Ohio Rev. Code § 2305.09. However, plaintiffs' claims against Sunshine for breach of the collectively-bargained pension plan sound in contract rather than in tort. *See Kraftco,* slip op. at 16. Ohio law provides a six-year statute of limitations for actions alleging breach of an oral contract, Ohio Rev. Code § 2305.07, and a fifteen-year statute of limitations for actions alleging breach of a written contract, Ohio Rev. Code § 2305.06. We hold that under either statute, plaintiffs' claims are not time-barred.

C. *Exhaustion*

Sunshine argues that plaintiffs' claims must be dismissed because they failed to exhaust the grievance and arbitration procedures contained in the collective bargaining agreement. Exhaustion of contractual grievance and arbitration procedures is a prerequisite to a section 301 action by an employee against the employer for breach of a labor contract. *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652-53 (1965). Whether a dispute must be arbitrated before judicial relief may be sought is determined by analyzing the collective bargaining agreement to see if it permits or requires arbitration. *Schneider Moving & Storage Co. v. Robbins,* 104 S. Ct. 1844, 1849 (1984).

The 1968 and 1970 collective bargaining agreements between Local 310 and Sunshine provided a grievance and arbitration procedure to handle "any controversy or difference . . . aris[ing] between the company and the union with respect to interpretation or effect" of the collective bargaining agreement. The collectively-bargained pension plan did not provide for grievance and arbitration of disputes arising under it, but vested in an administrative committee, to be appointed by Sunshine's board of directors, exclusive author-

ity to determine questions arising in administration and interpretation of the plan. The collective bargaining agreement did not contain any provisions for pension benefits nor incorporate the pension plan by reference. Because the collective bargaining agreement and pension plan did not permit or require grievance and arbitration of disputes arising under the pension plan, plaintiffs' claims should not be dismissed for failure to exhaust contractual remedies. *See RCA Corp. v. Local 241, International Federation of Professional and Technical Engineers,* 700 F.2d 921, 927 (3d Cir. 1983).

D. *Waiver and Estoppel*

Sunshine argues that the district court's presentation of the single factual issue to the jury violated this court's mandate in *Apponi I* and improperly deprived it of a full trial on the issues of waiver and estoppel. The equitable doctrines of estoppel and waiver are applicable in a section 301 action to enforce a labor contract. *See Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Local Union No. 744 v. Metropolitan Distributors, Inc.,* 763 F.2d 300, 304 (7th Cir. 1985); *Hass v. Darigold Dairy Products,* 751 F.2d 1096, 1099 (9th Cir. 1985). Further, estoppel and waiver involve questions of fact which should be submitted to the jury. *See Ouimette v. E. F. Hutton & Co.,* 740 F.2d 72, 76 (1st Cir. 1984); *United States v. Commercial Mechanical Contractors, Inc.,* 707 F.2d 1124, 1128 (10th Cir. 1982).

The elements constituting estoppel, as defined by federal common law, are: (1) conduct or language amounting to a representation of material facts; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on or act such that the party asserting the estoppel has a right to believe it so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation. *Acri v. International Association of Machinists,* 781

F.2d 1393, 1398 (9th Cir. 1986); *see also Hass*, 751 F.2d at 1099-1100. Waiver, as defined by federal common law, requires an "intentional relinquishment of a known right." *Larkins v. NLRB*, 596 F.2d 240, 247 (7th Cir. 1979). Under either doctrine, imposition of liability requires proof of more than the mere fact that a representation was made. *Acri*, 781 F.2d at 1398; *Larkins*, 596 F.2d at 247.

The district court erroneously concluded that this court's mandate in *Apponi I*, remanding for "a jury trial as to whether the company made the representations alleged," precluded the jury's consideration of all other elements of waiver and estoppel. It has long been recognized that in determining the intent of the mandate, it is appropriate to look to the entire opinion of the court of appeals. *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 n.2 (11th Cir. 1984) (per curiam). This court, in its prior opinion, stated:

> We think that the allegations made in [plaintiffs'] affidavits present triable issues of fact. We rely on two related doctrines, waiver and estoppel. It is well settled that a party may voluntarily relinquish a known right through words or by conduct. . . . It is similarly settled that a party whose conduct misleads another is barred, or estopped from asserting legal rights that it otherwise could assert. . . . If company representatives did make the statements they were alleged to have made during the labor negotiations, then the company shall be precluded from arguing that it is not liable.

652 F.2d at 649-50 (citations and footnotes omitted). Further, this court stated in a footnote to the opinion that "issues as to waiver or estoppel are classic examples of disputed questions of fact which are amenable to decision by a jury." 652 F.2d at 651 n.12.

Although not free from ambiguity, this court's opinion in *Apponi I* contemplated a jury trial on all the elements of

waiver and estoppel. The district court's failure to follow this court's mandate requires that this case be remanded for a jury trial on those elements of waiver and estoppel not submitted to the jury in the prior proceeding. *See In re United States Steel Corp.*, 479 F.2d 489, 493-94 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973).

Sunshine argues that the jury's finding that Sunshine's negotiators made the representations alleged must be set aside because the district court erroneously excluded evidence offered to prove that Sunshine's negotiators did not make the representations. Specifically, Sunshine challenges the district court's exclusion of the following evidence: (1) a 1974 letter from Joseph G. Kane, Executive Vice-President of the Bakery and Confectionary Workers International Union, to Charles Vest, a named plaintiff, stating that Vest was not entitled to pension benefits because he left Sunshine's employ prior to his fifty-fifth birthday; (2) Kay Apponi's statement that she was told by her attorney in 1972 or 1973 that her case lacked merit; (3) testimony of James K. Lawrence, a purported expert in labor relations, that plaintiffs did not exhaust available grievance and arbitration procedures, that the pension plan provided early retirement benefits only to those employees who attained age fifty-five while in Sunshine's employ, and that it was unlikely that any oral agreement between Local 310 and Sunshine would not have been integrated into the agreement; and (4) exit interview forms indicating that plaintiffs were not presently entitled to pension benefits. The district court found this evidence irrelevant and of no probative value. We agree.

Under the Federal Rules of Evidence, the district court has broad discretion in determining the relevancy and admissibility of evidence. *See United States v. Blanton*, 700 F.2d 298, 313 (6th Cir.), *adopted on reh'g*, 719 F.2d 815, 833 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *United States v. Phillips*, 575 F.2d 97, 100 (6th Cir. 1978); *United States v. Jenkins*, 525 F.2d 819, 824 (6th Cir. 1975) (per curiam). A

district court's ruling on evidentiary matters will be reversed only on a clear showing of abuse of discretion. *Blanton,* 700 F.2d at 313; *Jenkins,* 525 F.2d at 824. Similarly, the determination whether to admit expert testimony is committed to the sound discretion of the district court. *See United States v. Green,* 548 F.2d 1261, 1268 (6th Cir. 1977). The district court's decision to exclude expert testimony will be sustained "unless manifestly erroneous." *Id.* (quoting *Spring Co. v. Edgar,* 99 U.S. 645, 658 (1878)).

Evidence may be excluded as irrelevant if it is not probative of the proposition it is offered to prove. Fed. R. Evid. 401; *see also* 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5165 (1978). The Kane letter is not probative of whether the alleged representations were made because Kane was not present during the negotiations, and there is no evidence that he knew what transpired. The exit interview forms are not probative of whether the alleged representations were made because they showed only that no retirement benefits were due plaintiffs when the bakery closed and did not in any way foreclose the possibility of retirement benefits accruing at a later date. Kay Apponi's statement with regard to what she was told by her attorney is obviously not probative of whether the alleged representations were made.

Under Rule 702 of the Federal Rules of Evidence, expert testimony may be admitted if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Here, the legal conclusions of Sunshine's purported expert would not have assisted the jury's understanding of the evidence or their determination whether the representations were made. Moreover, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co. v. Diners Club, Inc.,* 550 F.2d 505, 509-10 (2d Cir.), *cert. denied,* 434 U.S. 861 (1977). Thus, the district court's exclusion of the evidence offered was not an abuse of discretion or manifestly erroneous, and the jury's finding that the representations were made will not be disturbed.

Although the evidence excluded was not probative of whether Sunshine's negotiators made the representations alleged, it may be probative of whether there was justifiable and detrimental reliance on the part of the Union and/or the plaintiffs. On remand the jury must consider whether the representations were made by one with authority to bind Sunshine, whether the representations were assertions of opinion or of material fact, and whether the representations were intended by the speaker to be acted upon by the plaintiffs or induce them to take action which they otherwise would not have taken. The district court may need to reconsider these evidentiary rulings in light of the remand for the purpose of determining whether all the requirements of equitable estoppel have been satisfied in the case.

E. *Special Master's Report*

Sunshine argues that the district court improperly referred the question of damages to the special master and erroneously adopted the special master's recommendation. Our decision reversing the district court's imposition of liability requires us to vacate the award of damages. Thus, review of the special master's report is unnecessary.

III. PLAINTIFFS' APPEAL

A. *Interpretation of the Pension Plan*

Plaintiffs argue that this court should construe the pension plan to confer early retirement benefits upon those employees with fifteen years of service regardless of whether they were employed at the bakery at age fifty-five. Paragraph 23 provides that "[a]n employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service." "Employee" means "one employed by another . . . for wages." Webster's New International Dictionary 742 (3d ed. 1981). "Retire" means "to withdraw from office, public station, business occupation, or

active duty." *Id.* at 1939; *see also* Black's Law Dictionary 1183 (5th ed. 1979) ("retire" means "[t]o terminate employment or service upon reaching retirement age."). Those individuals who left Sunshine's employ before age fifty-five were not "employees" when they reached age fifty-five and thus could not "retire" on that date. Thus, paragraph 23 is not ambiguous, and no construction is necessary. *See Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1288-89 (6th Cir. 1986); *Local 783, Allied Industrial Workers v. General Electric Co.*, 471 F.2d 751, 757 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973).

Moreover, plaintiffs' proposed construction would require enlargement of the class of plaintiffs beyond that certified by the district court. The district court certified a class composed of "all former employees of [Sunshine] employed at the Dayton plant thereof who prior to April 30, 1972, had completed 15 years of continuous service and had not by April 30, 1972 attained the age of 55 years." In *Apponi I*, this court stated that "[t]he plaintiff class members are former Sunshine employees who accumulated 15 or more years service with the company before losing their jobs in 1972 when Sunshine shut down its Dayton Bakery." 652 F.2d at 646. Persons who left Sunshine prior to closing of the bakery are not members of the class.[1]

B. *Attorneys' Fees*

Plaintiffs argue that the district court should have granted

---

[1]Plaintiffs also argue that this court should construe the pension plan to confer early retirement benefits upon all former employees with fifteen years' service "regardless of whether they were members of [Local 310] to which the estoppel related." Having concluded that paragraph 23 confers early retirement benefits only upon those employees who were working at Sunshine at age fifty-five, we must also conclude that those employees who were not working at Sunshine at age fifty-five and who were not members of Local 310 are not entitled to early retirement benefits.

their motions to tax their attorneys' fees against Sunshine and compel discovery of Sunshine's attorneys' fees. An appellate court has jurisdiction to entertain appeals only from final orders. *See* 28 U.S.C. § 1291. Attorney fee issues are subject to the "ordinary principles of finality." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3915, at 270 (Supp. 1986); *see also Fort v. Roadway Express, Inc.*, 746 F.2d 744, 747 (11th Cir. 1984). Plaintiffs' motions regarding attorneys' fees, having not been ruled on by the district court, are not currently reviewable by this court.

C. *Special Master's Fees*

Plaintiffs argue that the fees of the special master should have been taxed to defendant rather than split between the parties because the proceedings before the special master were necessitated by Sunshine's fraudulent denial of its obligations under the pension plan and because plaintiffs prevailed. Under Rule 53(a) of the Federal Rules of Civil Procedure, the district court may charge the special master's compensation against one or more of the parties or apportion it among them. *See Morgan v. Kerrigan*, 530 F.2d 401, 427 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *Erickson's, Inc. v. Travelers Indemnity Co.*, 454 F.2d 884, 885 (5th Cir.), *cert. denied*, 409 U.S. 847 (1972). The district court has broad discretion to determine which of the parties to charge, and the district court's decision will not be disturbed absent an abuse of that discretion. *Morgan*, 530 F.2d at 427.

Contrary to plaintiffs' argument, the record does not contain any indication that Sunshine has acted fraudulently. Plaintiffs' fraud claims were dismissed shortly after this action was filed. Further, assessment of a portion of the special master's fees against the prevailing party does not constitute a per se abuse of discretion. See *Dyker Building Co. v. United States*, 182 F.2d 85, 89 (D.C. Cir. 1950). Plaintiffs have not shown any basis for concluding that the district court abused its discretion, and the taxing of the special master's fees by the district court is affirmed.

IV.

For the reasons stated above, we REVERSE in part and REMAND to the district court for a jury trial on those elements of waiver and estoppel not previously submitted to the jury. However, having concluded that the jury's determination that Sunshine's negotiators made the representations alleged is free from error, that determination is binding upon the parties. On remand, the district court shall instruct the jury that the representations were made.

No. 83-3541
No. 83-3570
No. 83-3764
No. 83-3817

United States Court of Appeals

For The Sixth Circuit

APPONI, ET AL.,
Plaintiffs-Appellees,
v.
SUNSHINE BISCUITS, INC.,
Defendant-Appellant,

ORDER

BEFORE: EDWARDS, MERRITT and WELLFORD, Circuit Judges

This matter is before the Court upon appellees' motion to dismiss the appeal filed by appellant, appellant's memorandum in opposition thereto, appellees' reply memorandum, the appeal of the appellees, and the supplemental appeals by both parties.

Upon careful consideration, it is concluded that the July 6, 1983 district court order from which the parties appeal in Case Numbers 83-3541 and 83-3570 is not final and appealable under 28 U.S.C. §1291. *Liberty Mutual Insurance Company v. Wetzel,* 424 U.S. 735, 742 (1976); *Rudd Const. Equip. Co., Inc. v. Home Ins. Co.,* 711 F.2d 54 (6th Cir. 1983). Moreover, it is clear that the October 4 report of the special master, which is appealed from in Case Numbers 83-3764 and 83-3817 is not final since the district court has not entered a final order respecting that

report. Therefore, this Court lacks jurisdiction to entertain these appeals.

It is therefore ORDERED that the motion to dismiss Case Number 83-3541 for lack of jurisdiction be and hereby is granted. It is also ORDERED that the appeal of the appellees in Case Number 83-3570, and the appeals of both parties to the October 4 report of the special master (Case Numbers 83-3764 and 83-3817 respectively) be and hereby are dismissed.

It is further ORDERED that this cause be and hereby is remanded to the district court for a final decision on the issue of the lump sum damage awards for the appellees.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

Dated: January 20, 1984

No. 79-3529

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KAY APPONI, ET AL.,
Plaintiffs-Appellants,

v.

SUNSHINE BISCUITS, INC.,
Defendant-Appellee.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed June 24, 1981

Before: LIVELY and KEITH, Circuit Judges and COHN,* District Judge.

KEITH, Circuit Judge. This case presents issues of contract construction. The contract in question is a pension plan which covered employees at the Sunshine Biscuit Company's Dayton, Ohio bakery. Sunshine closed its Dayton bakery in June of 1972. At that same time, Sunshine terminated the pension plan which covered the bakery workers. A class of former Sunshine employees who had worked at the bakery and who had been covered by the pension plan filed this suit. The workers claimed that they were entitled to benefits under the plan. The district court concluded that the workers were clearly not entitled to benefits. Accordingly, the court granted Sunshine's motion for summary judgment. We think that there are questions of fact that can only be resolved at trial. Accordingly, we reverse and remand for further proceedings.

---

* The Honorable Avern Cohn, United State District Court for the Eastern District of Michigan, sitting by designation.

FACTS

The factual circumstances surrounding the closing of Sunshine's Dayton bakery are not in issue. What is in issue is whether certain former employees are entitled to benefits under the pension plan. The pension plan itself is relatively short and simple. It reads as follows:

THE COMPLETE TEXT
OF THE
SUNSHINE PENSION PLAN
AS IN EFFECT JANUARY 1, 1970

Effective Date

1. The Pension Plan is applicable to all covered employees of Sunshine Biscuits, Inc. eligible for retirement on or after January 1, 1958, in accordance with the provisions hereof.

Coverage

2. An employee is covered by the Pension Plan if he is employed by any of the Company's biscuit, cracker or candy manufacturing plants, cheese plant, flour mills, or branches regularly distributing the finished products of such plants, or is one of any other group of employees to whom coverage under the Plan has been extended by action of the Board of Directors or the Plan's Administrative Committee.

3. Pension benefits under this Plan are not payable to any employee who is a participant under any other Annuity, Retirement, Pension or similar plan which is wholly or partially financed by the Company.

Normal Retirement Benefits

4. The normal retirement date is the first day of the month next following the employee's 65th birthday, if the employee is then in the active employ of the Company.

5. An employee will be eligible to retire on his normal retirement date, provided he has completed 15 or more years of continuous service.

6. The first payment of an employee's pension benefits will be made upon retirement, and subsequent payments will be made monthly thereafter.

7. The amount of normal retirement benefit payable to an employee each month will be determined from his years of service and average monthly earnings for the 5-year period ending on December 31st prior to normal retirement date, in accordance with the applicable table set forth at the end hereof. The computation of "years of service" and "average monthly earnings" is set forth in Paragraphs 9-17 hereof.

8. Benefits will be paid to a retired employee as long as he lives, provided he does not engage in any occupation in competition with or detrimental to the business of the Company or any of its branches, subsidiaries or affiliated companies.

Computation of Years of Service

9. "Years of Service" means completed years of continuous service from date of employment to actual or normal retirement date, but in no event beyond normal retirement date.

10. Loss of time due to accident incurred in the course of employment will be counted as continuous service.

11. Military leaves of absence will be counted as continuous service if the employee returns to employment in accordance with the terms specified by applicable law or in his leave.

12. Leaves of absence exceeding 9 months in duration will break continuous service, except in cases of serious personal circumstances such as illness or

accident, where leaves of absence are extended with the written approval of the Company.

13. Lay-offs exceeding 9 months in duration will break continuous service.

14. If an employee leaves the service of the Company and is subsequently re-employed, the date of re-employment will be used in determining his continuous service.

Computation of Average Monthly Earnings

15. "Average Monthly Earnings" means the employee's average monthly base pay for the 5-year period ending on December 31st prior to his actual or normal retirement date, excluding overtime compensation, premium pay and any other extra remuneration.

16. If an employee has been paid on an hourly, weekly, semi-monthly or bi-weekly basis, his earnings will be converted to their monthly equivalent.

17. If an employee has lost earnings as a result of absence from work due to sickness or accident for a period of 30 consecutive calendar days, each such period will be disregarded in computing his average monthly earnings.

Disability Pensions

18. If an employee becomes permanently and totally disabled during active employment with the Company when he is age 45 or more and has 15 or more completed years of continuous service at the time he becomes disabled, he will be eligible to be retired on a disability pension.

19. An employee will be considered to be permanently and totally disabled by the Administrative Committee upon receipt of a certificate to that effect from a physician designated by the Company, or

upon such other proof as the Committee may prescribe.

20. Disability pensions will be paid beginning with the 7th month from the commencement date of the disability.

21. The amount of disability pension payable to an employee each month will be $45, or an amount computed as follows, whichever is greater:

(a) Determine the amount applicable to the employee's years of service and average monthly earnings for the 5-year period prior to the date of commencement of disability in accordance with the applicable table set forth at the end hereof.

(b) Reduce the amount determined under (a) by 6% for each year or fraction thereof prior to age 62.

(c) To the result determined in accordance with (a) and (b), add 10%.

(d) Round off the amount determined in accordance with (c) to the nearest dollar.

(e) In no case shall the amount determined in accordance with (d) exceed the amount determined in accordance with (a).

22. The Company reserves the right to require proof of continuation of permanent and total disability from time to time, and may terminate disability pensions if proof is not provided.

Early Retirement Benefits

23. An employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service.

24. An employee may apply for early retirement for reasons other than permanent and total disability,

with the understanding that he will not engage in any occupation in competition with or detrimental to the business of the Company or any of its branches, subsidiaries or affiliated companies.

25. The amount of early retirement benefit payable to an employee each month will be computed as follows:

(a) Determine the amount applicable to the employee's years of service and average monthly earnings for the 5-year period prior to the date of early retirement in accordance with the applicable table set forth at the end hereof.

(b) Reduce the amount determined in accordance with (a) by 6% for each year or fraction thereof prior to age 62.

(c) Round off the amount determined in accordance with (b) to the nearest dollar.

In Event of Death of Retired Employee

26. (a) At any time before payment of benefits is to begin an employee may elect to take a reduced pension of equivalent actuarial value payable to the employee for life and to a designated beneficiary for life if the beneficiary survives him. Each such election shall become effective on an effective date (provided the employee is then living) to be specified therein that must be at least two years after filing of the election.

(b) If optional election of a reduced pension shall not have been made and become effective as provided in sub-paragraph (a), retirement benefits will be paid for 36 months from date of retirement, provided at least one payment shall have been made; if death occurs before a retired employee receives 36 monthly payments, his retirement benefits will con-

tinue to be paid to his beneficiary after his death for the remainder of the 36-month period.

Social Security

27. Benefits under the Pension Plan are in addition to the benefits to which a retired employee may be entitled under the Social Security Law.

Assignments

28. No employee shall have the right to assign, transfer or otherwise to subject to lien the benefits under the Pension Plan, except as may be otherwise provided or required by law.

Cost

29. The cost of the Pension Plan is to be borne entirely by the Company.

Miscellaneous

30. Nothing in this Pension Plan in itself shall give any employee the right to be retained in the employ of the Company.

31. An Administrative Committee, appointed by the Board of Directors, shall administer the Pension Plan. The determination of the Committee as to all administrative and interpretive matters and the application of the Pension Plan shall be conclusive.

32. The Company has every intention of continuing the Plan indefinitely. However, should unforeseen events occur in the future, the Company reserves the right to modify or terminate the Plan.

The key provision of the pension plan which is in dispute here is paragraph 23. Paragraph 23 provides:

"An employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service."

The plaintiff class members are former Sunshine employees who accumulated 15 or more years service with the company before losing their jobs in 1972 when Sunshine shut down its Dayton bakery. However, all of the class members were under 55 at this time. The plaintiff class members argue that under ¶ 23, minimum pension rights vested after 15 years of employment. The plaintiffs contend that 15 years continuous service is all that is required. According to the plaintiffs, the clause "provided he is at least 55 years of age" only refers to the time the employee begins to collect his benefits.

Unsurprisingly, Sunshine disagrees. Sunshine contends that in order to retire early, an employee had to have 15 years continuous service and had to be working for the company at age 55. Therefore, according to Sunshine, an employee had to be at least 55 years old *and* have 15 years service before the employee acquired any pension rights. Sunshine views the age 55 requirement as a minimum vesting age. Sunshine interprets the pension plan as giving a 55 years old employee with 15 years service the option of retiring early and taking a reduced pension, on continuing to work until age 65 and retiring on a full pension.

The district court initially found some merit in plaintiff's position, and denied Sunshine's motion to dismiss. However, upon further reflection, the court thought that the plain and ordinary meaning of the pension plan compelled it to agree with Sunshine. Accordingly, the court entered summary judgment for Sunshine. The plaintiffs have appealed.

I.

This case presents a clash between conflicting rules of contractual construction. The district court accepted Sunshine's argument that the plain and ordinary meaning of the words in Paragraph 23 were such that plaintiffs were not entitled to benefits. The "plain and ordinary meaning" doctrine is at the heart of contract construction. Under this doctrine, "words

appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander* v. *Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 245-6, 374 N.E. 2d 146, 150 (1978). *See also, Jolliff* v. *Hardin Cable Television Co.*, 26 Ohio St. 2d 103, 106-07, 269 N.E. 2d 588, 590 (1971); *Olmstead* v. *Lumbermens Mutual Insurance Co.*, 22 Ohio St. 2d 212, 216, 259 N.E. 2d 123, 126 (1970).[1]

Sunshine's argument is simple. The dictionary definition of "employee" is "one who works for wages or salary in the service of any employer."[2] The dictionary definition of "retire" is "[t]o withdraw from office, a public station, business, or the like . . ."[3] Applying these dictionary definitions, Sunshine argues that in order to retire from a company, one must then be employed by it. Sunshine laid off the members of the plaintiff class in 1972, before any of these workers reached the age of 55. Sunshine concludes that the workers' pension rights never vested since the workers were not "employees" at age 55 and thus could not "retire" at that age. Sunshine

---

[1] Federal jurisdiction in this case is based on diversity of citizenship. 28 U.S.C. § 1332. The issues raised are those of state law and there is no question that Ohio law controls this case. *See e.g. American Fidelity & Casualty Co.* v. *Indemnity Life Ins. Co. of North America*, 308 F.2d 697, 699 (6th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963).

We note that had the Bakery employees in this case been terminated after 1974, they would have been protected by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* Under the federal pension standards outlined in ERISA, it appears that the company could not cut off benefits to these workers. *See* 29 U.S.C. §§ 1053, 1056(a). However, because the Bakery was shut down in 1972, over two years before ERISA was enacted, ERISA provides no protection. *See Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979). *See also* 29 U.S.C. § 1001, which contains ERISA's findings and declaration of policy. (". . . many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans . . . owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .").

[2] Webster's New International Dictionary 839 (2d ed. 1961).

[3] *Id.* at 2128.

buttresses this basic argument by contending that examination of the rest of the pension plan supports its position.[4]

The plaintiffs argue that the "plain and ordinary meaning" doctrine is inapplicable here because the pension plan is ambiguous. Plaintiffs argue that the "employee" does not have to be an employee at the time of his 55th birthday to be eligible for early retirement – it should be enough that he was an "employee" for 15 years.

Plaintiffs point out that the pension plan has two other provisions providing for benefits. One provision relates to normal retirement benefits; the other relates to disability benefits. In each of the paragraphs relating to normal retirement benefits and disability benefits, the pension plan used words of limitation to narrow the definition of "employee." Specifically, paragraph four provides:

> The normal retirement date is the first day of the month next following the employee's 65th birthday, *if the employee is then in the active employ of the company* (emphasis added).

Paragraph 18 provides:

> If an employee becomes permanently and totally disabled *during active employment with the Company* when he

---

[4] First, the company points out that paragraph 24 of the pension plan provides that an employee who takes early retirement cannot engage in employment detrimental to the company. As the district court noted, this contemplates that the employee will be employed by the company when the employee applies for early retirement.

Second, the company points out that under paragraph 25, the amount of early retirement benefits is computed by determining average monthly wages for the five-year period prior to the date of early retirement. Under the plaintiffs' construction, former employees who were not employed by the company during the five-year period prior to their 55th birthday would have no base pay period from which to compute a pension. The company argues that this anomalous situation suggests that plaintiffs' construction of the pension plan is incorrect.

Third, the company argues that throughout the plan there is a repeated and definite linkage between employment and retirement. *e.g.* "an employee may apply for early retirement." (P24) This linkage,

> is age 45 or more and has 15 or more completed years of continuous service at the time he becomes disabled, he will be eligible to be retired on a disability pension. (emphasis added)

Plaintiffs point out that paragraph 23, relating to early retirement benefits, contains no similar words of limitation. Plaintiffs argue that it follows that there was no intent by the parties to limit the term "employees" in paragraph 23 to employees in active employment with the company at the time they retired.

Plaintiffs point out that other provisions in the pension plan do not require an "employee" to be employed at the time he becomes eligible to collect benefits. Specifically, an "employee" who is disabled can collect a disability pension seven months after the commencement of the disability. *See* ¶¶ 20, 21 of pension plan, reprinted *supra*. Yet, such an "employee" is obviously not working if he is disabled. From this, plaintiffs argue that "the term 'employee' is used throughout the written pension plan to refer to a potential recipient of pension benefits, without regard to whether he is currently employed by Sunshine." Pl. Br., at 10.

Finally, plaintiffs seek support in Ohio precedents which require us to strictly construe pension plans to avoid a for-

---

argues the company, demonstrates that the pension plan required an employee to meet both the age and length of service requirements to qualify for early retirement benefits.

The Company also cites a number of cases which it claims supports its position. *See Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979); *Gratian* v. *General Dynamics, Inc.*, 587 F.2d 121 (2d Cir. 1978); *United Steel Workers, Local 2098* v. *International Systems & Controls Corp.*, 566 F.2d 1135 (10th Cir. 1977); *Schneider* v. *Electric Auto Lite Co.*, 456 F.2d 366 (6th Cir. 1972); *Finnell* v. *Cramet, Inc.*, 289 F.2d 409 (6th Cir. 1961); *International Association of Machinists* v. *Servel, Inc.*, 268 F.2d 692, 698-99 (7th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Wallace* v. *Northern Ohio Traction & Light Co.*, 57 Ohio App. 203, 204, 13 N.E. 2d 139, 149 (1937). The problem is that each of these cases interpreted a pension plan which is different from the one in this case. Although sometimes analogies exist, cases presenting issues of contract construction are *sui generis*.

feiture,[5] and which also require us to strictly construe the plan against Sunshine, the drafter of the plan.[6]

II.

The defendant has a strong argument that the plain and ordinary meaning of the words "employee" and "retire," preclude the award of early retirement benefits to former employees of the company. The notion of an employee retiring would seem to include, as a prerequisite, employment immediately prior to the termination of any working relationship between the company and the employee.

On the other hand, the company did not clearly limit early retirement benefits to those employees working at the company at a given time. Yet the company was careful to limit disability and "normal" retirement benefits to those employees. Therefore, there is arguably room enough for us to apply Ohio's strong policies against forefeiture of benefits in order to rule in plaintiffs' favor.

Upon consideration, however, we see no need to rule on the contract construction question. We believe that there is an issue for the trier of fact which may well dispose of this appeal.

The plaintiffs introduced numerous affidavits from former employees at the Sunshine Bakery. In these affidavits, the employees claimed that company representatives had lied during collective bargaining negotiations. The content of the affidavits is well summed up in the following paragraph from the plaintiffs' brief:

---

[5] *See Ervin* v. *Garner*, 25 Ohio St. 2d 231, 240, 267 N.E.2d 769 (1971); *Matter of Erie Lackawanna Railway Co.*, 548 F.2d 621, 627 (6th Cir. 1977). *See also Lemmon* v. *Cedar Point, Inc.*, 406 F.2d 94, 97 (6th Cir. 1969); *Neuffer* v. *Bakery & Confectionary Workers International Union*, 307 F.2d 671, 674 (D.C. Cir. 1962).

[6] *See Smith* v. *The Eliza Jennings Home*, 176 Ohio St. 351, 199 N.E. 2d 733 (1964); *Sigman* v. *Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 11 N.E.2d 878 (1937); *Keller* v. *Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1011 (N.D. Ohio 1976).

> In short: (i) in negotiations prior to the 1968 contract negotiations Union representatives told Sunshine's negotiators that they understood that an employee with fifteen years' service did not have to be working at Sunshine on his fifty-fifth birthday in order to qualify for early retirement benefits and Sunshine's negotiators agreed; (ii) in the 1968 and 1970 contract negotiations, when the Union representatives requested clarifying language consistent with their understanding, Sunshine's negotiators responded that that was unnecessary because Sunshine agreed with that understanding; (iii) that understanding was communicated to the employees at contract ratification meetings; and (iv) the employees relied upon those communications of their understanding that an employee with at least fifteen years' service did not have to be working at Sunshine on his fifty-fifth birthday in order to qualify for early retirement benefits.

We think that the allegations made in the affidavits present triable issues of fact. We rely on two related doctrines, waiver and estoppel.[7] It is well settled that a party may voluntarily relinquish a known right through words or by conduct. *State ex rel. Ford* v. *Board of Education*, 141 Ohio St. 124, 47 N.E.2d 223 (1943); *White Co.* v. *Canton Transportation Co.*, 131 Ohio St. 190, 1 N.E. 2d 501, 503-05 (1936); *List & Son Co.* v. *Chase*, 80 Ohio St. 42, 88 N.E. 120, 122 (1909). It is similarly settled that a party whose conduct misleads another is barred, or estopped from asserting legal rights that it otherwise could assert. *Ohio Farmers Ins. Co.* v. *Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922); *National City Bank* v. *Citizens Bldg. Co. of Cleveland*, 74 N.E. 2d 273 (Cuyahoga County Court of Appeals 1947).[8] If company

---

[7] Waiver and estoppel are related doctrines. *See Andrews* v. *Ohio St. Teachers Ret. Sys. Bd.*, 62 Ohio St. 2d 202, 404 N.E.2d 747 (1980). *See also Russell* v. *Fourth Nat'l. Bank*, 102 Ohio St. 248, 269-70, 131 N.E. 726 (1921).

[8] The elements of estoppel have been stated in various ways. In *Ensel* v. *Levy*, 46 Ohio St. 255, 19 N.E. 597 (1889), the court stated:

> . . . it is fair to assume, that where one, by his acts or declara-

representatives did make the statements they were alleged to have made during the labor negotiations, then the company shall be precluded from arguing that it is not liable. The company will simply be held to its word.[9]

> tions, made deliberately and with knowledge, induces another to believe certain facts to exist, and that other rightfully acts on the belief so induced, and is mislead thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled.

Similarly, in *Indemnity Co.* v. *Shavel Co.*, 112 Ohio St. 136, 152, 147 N.E. 329 (1925) and *Fleming* v. *City of Steubenville*, 44 Ohio App. 121, 184 N.E. 701 (1931), citing 21 Corpus Juris 1113, the court stated:

> Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, misrepresentations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

More recently, the Ohio Supreme Court has stated:

> Equitable estoppel precludes a party from asserting certain facts where the party, by his conduct, has induced another to change his position in good faith reliance upon that conduct.

State ex rel Cities Service Oil Co. v. *Orteca*, 63 Ohio St. 2d 295, 409 N.E. 2d 108, 1020-21 (1980). (citing cases)

The statements made in the affidavits more than meet all of the elements of equitable estoppel. Paragraph 23 in the pension plan has enough ambiguity that we can see why the union would reasonably rely on the company's representations that an employee's rights would vest after 15 years of service. In any event, the existence of representations, if any, is for the jury to determine. A court can then determine whether the union reasonably and detrimentally relied on the representations of the company negotiators.

[9] Our position is also supported by federal labor law policy. Pension plans and retirement benefits are compulsory subjects of collective bargaining. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *NLRB* v. *Black-Clawson Co.*, 210 F.2d 523 (6th Cir. 1954). An employer such as Sunshine has a duty to bargain in good faith over compulsory subjects of collective bargaining. We think that Ohio courts would construe Ohio law to further federal labor law policies.

III.

The plaintiffs have raised other claims. None have merit. First, the plaintiffs alleged a violation of the federal securities laws. This cause of action is precluded by *Teamsters* v. *Daniel*, 439 U.S. 551 (1979). Second, the plaintiffs claimed that the company's alleged misrepresentations amounted to common-law fraud. Fraud claims are governed by Ohio's four-year statute of limitations, Ohio Rev. Code § 2305-09. We must agree with the district court that this claim is time-barred.[10] Finally, plaintiffs raise various arguments concerning the district court's certification of the class.[11] There is no need for us to reach these questions now. If necessary, class-certification questions can be resolved once the merits are decided.

IV.

In summary, we reverse and remand for a jury trial as to whether the company made the representations alleged in the affidavits.[12] Accordingly, the judgment of the district court

---

10 There is no doubt that the plaintiffs' cause of action accrued when the alleged fraudulent act took place or was discovered. This was no later than 1972 when the company shut down its Dayton Bakery. *See Peterson* v. *Teodosio*, 34 Ohio St. 2d 161, 297 N.E. 2d 113 (1973). The complaint was not filed until November, 1977.

We emphasize that the plaintiffs never claimed that they were unaware of the alleged fraud. Plaintiffs specifically declined to make a tolling argument below.

11 Plaintiffs argue that the district court erred in establishing two sub-classes of plaintiffs rather than a single, unitary class. Plaintiffs also argue that the district court erred in establishing certain cut-off dates for subclass membership.

12 The respective roles of judge and jury in contract cases depends on the circumstances. Ordinarily, the construction of a written contract is a matter of law, to be decided by a judge. *See Alexander* v. *Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 246, 374 N.E. 2d 146, 148 (1978); *New York, Chicago & St. Louis Railroad* v. *Heffner Construction Co.*, 9 Ohio App. 2d 174, 177, 223 N.E. 2d 649, 653 (1967). However, "[w]hile it is the function of a court to construe a contract, it is the province of the jury to ascertain and determine the intent and meaning of the contracting parties in the use of uncertain or ambiguous language." *Amstutz* v. *Prudential Insurance Co.*, 136 Ohio

is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this opinion.

St. 404, 26 N.E. 2d 454 (1940). *See Filtro Import Co.* v. *Janszen Co.*, 36 Ohio App. 63, 172 N.E. 578 (1930); *Petroleum, Inc.* v. *Liberty Petroleum Co.*, 505 F.2d 1384 (6th Cir. 1974). *See generally* Annot., 65 A.L.R. 648 (1930).

In this case, we do not think that there is sufficient ambiguity in the wording of the pension plan of the sort that might create a jury question. However, issues as to waiver or estoppel are classic examples of disputed questions of fact which are amenable to decision by a jury. *See e.g. Pannunzio* v. *Ins. Co.*, 168 Ohio St. 95, 151 N.E. 2d 545 (1958). See also Judge Engel's excellent discussion on the role of judge and jury in determining questions of estoppel and tolling of a statute of limitations. *Ott* v. *Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979) (age discrimination case).

IN THE

United States District Court

SOUTHERN DISTRICT OF OHIO

KAY APPONI, et al.,
Plaintiffs,
v.
SUNSHINE BISCUITS, INC.,
Defendant

Docket No.
C-3-77-397
Judge Carl B. Rubin

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That, after examination of the Report and Amended Report of the Special Master and upon consideration of the arguments of counsel, the Court determines that the findings of the Special Master are not clearly erroneous as to any questions of fact and are in accordance with the appropriate law on this subject.

Accordingly, the calculations of the actuary of the lump sum values of the pensions as shown on exhibits B and C of the Amended Report of the Special Master are hereby adopted by the Court.

Defendant Sunshine Biscuits Inc is directed forthwith to deposit in the Registry of this Court the total sum of

$3,032,158.43 as shown by such Special Master's Report pending determination by this Court of any matters remaining herein. The above sum includes interest from 7-6-83 to 8-20-85 at the Ohio statutory rate.

IT IS SO ORDERED.

Kenneth J. Murphy

. . /s/ KENNETH J. MURPHY . .
(By) Deputy Clerk

Date: September 3, 1985

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KAY APPONI, et al.,
Plaintiffs,
v.
SUNSHINE BISCUITS, INC.,
Defendant.

Civil No. C-3-77-397

ORDER

This matter is before the Court for consideration of the Amended Report of Computation of Lump Sum Award by the Special Master dated April 15, 1985 (Doc. 228). This protracted litigation has finally reached the point where the Amended Report by the Special Master is before the Court for consideration. The activities of the Special Master had been the subject of hearings, numerous meetings between counsel and the Court, and an exhaustive analysis of the manner in which the Special Master and actuary selected by him reached a conclusion.

Upon examination of the Report and Amended Report and upon consideration of the arguments of counsel, the Court determines that the findings of the Special Master are not clearly erroneous as to any questions of fact and are in accordance with the appropriate law on this subject. Accordingly, the calculations of the actuary of the lump sum values of the pensions as shown on exhibits B and C to doc. 228 are hereby adopted by the Court.

Defendant Sunshine Biscuits Inc., is directed forthwith to deposit in the Registry of this Court the total sum of $3,032,158.43 as shown by such Special Master's Report pending determination by this Court of any matters remaining herein. The above sum includes interest from July 6, 1983 to the date of this Order at the Ohio statutory rate.

IT IS SO ORDERED.

..../s/ CARL B. RUBIN....
Carl B. Rubin, Chief Judge
United States District Court

Dated: August 20, 1985

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KAY APPONI, ET AL.,
Plaintiffs.

v.

SUNSHINE BISCUITS, INC.,
Defendant.

Civil No.
C-3-77-397

ORDER

This matter is before the Court upon the Report of the Special Master, upon objections thereto filed by Plaintiffs and Defendant and upon a hearing held thereon on June 24, 1983.

Upon consideration of the foregoing the Court does adopt the Report of the Special Master with the exception that Eula Taulbee shall be excluded from any determination since Plaintiffs and Defendant have reached a compromise in her case.

The Special Master is directed to compute the dollar award for each person, together with prejudgment interest in accordance with the statutes of the State of Ohio from the date such person attained the age of fifty-five to the date of this Order. Upon the preparation of the foregoing, the Special Master shall be relieved of further responsibility hereunder and shall submit a statement for his services which shall be divided equally between Plaintiff class and Defendant.

This being a class action, Plaintiffs' counsel are directed to submit forthwith to the Court a statement of reasonable attorney fees in accordance with *Northcross* v. *Board of Education of the City of Memphis*, 611 F.2d 624. The award to members of the class in accordance with this Order shall be deemed to be a part hereof. This Order with such inclusion shall be deemed a final and appealable Order of this Court in the above-entitled matter.

IT IS SO ORDERED.

..../s/ CARL B. RUBIN....
Carl B. Rubin, Chief Judge
United States District Court

Dated: July 6, 1983

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF OHIO

KAY APPONI, ET AL.,
Plaintiffs,
vs.
SUNSHINE BISCUITS, INC., ET AL.,
Defendants.

Civil Action No. C-3-77-397

JUDGMENT

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, . United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiffs motions for summary judgment are DENIED; that the defendant's cross-motion for summary judgment is GRANTED;

the complaint herein is hereby DISMISSED.

Dated at Dayton, Ohio, this 8th day of June, 1979.

John D. Lyter
Clerk of Court

By: /s/ REBECCA E. ANDERSON
Rebecca E. Anderson, Deputy

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF OHIO
WESTERN DISTRICT

KAY APPONI, ET AL.,
Plaintiffs,

vs.

SUNSHINE BISCUITS, INC., ET AL.,
Defendants.

Case No. C-3-77-397

ORDER

This case is before the Court upon Cross Motions for Summary Judgment, memoranda and supporting affidavits. Count 2 of the Amended Complaint, which asserted claims under certain federal statutes and Count 3 of the Complaint, which asserted common law fraud under Ohio law have previously been dismissed due to the running of the appropriate statutes of limitations. This Order, therefore, concerns only Count 1 of the Amended Complaint, which involves a matter of contract interpretation.

Both Plaintiffs and Defendant allege that there is no genuine issue as to any material fact and that each is entitled to judgment as a matter of law. Plaintiffs were employees of Defendant at its Dayton, Ohio bakery when it closed in 1972. At that time, none of Plaintiffs had reached the age of 55 years. However, all had been employed by Defendant for 15 or more years. Sunshine maintained a pension plan for its employees. This plan contained the following language:

23. An employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service.

Plaintiffs argue that the above-quoted language authorizes retirement benefits for individuals who were employed by Defendant for 15 or more continuous years and who have now reached 55 years of age, even though they were not employees of Defendant at the time they reached their 55th birthday. Defendant construes the same language to mean that, in order to qualify for early retirement, an employee must have completed 15 or more years of continuous service and must have attained age 55 while employed by Defendant. The parties agree that the interpretation of the pension plan is a question of law and that the law of the State of Ohio governs the interpretation of this contract. See *American Fidelity & Casualty Co.* v. *Indemnity Ins. Co. of North America,* 308 F.2d 697, 699 (6th Cir. 1962); *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005 (N.D. Ohio 1976).

In order to interpret the contract, the Court must first look to the contract language itself to determine whether its meaning is plain or ambiguous. The intention of the contracting parties should be gathered from an analysis of the instrument as a whole and not from its separate provisions. *Vreeland* v. *Federal Power Commission,* 528 F.2d 1343 (5th Cir. 1976). Thus, paragraph 23 of the contract must be examined in light of the contract as a whole.

The language of the plan must be construed most strongly against Defendant since the existing implications could have been restricted by words of limitation. *Sigman* v. *Rudolph Wurlitzer Co.,* 57 Ohio App. 4, 7, 11 N.E.2d. 878 (1937). Plaintiffs are entitled to the benefit of all reasonable inferences applicable to the words used. However,

before Plaintiffs can assert a vested right to benefits under the plan, they must have satisfied all the prerequisites to disability set forth in the plan. *Keller* v. *Graphic Systems of Akron, supra.*

Under Ohio law, where an employee has complied with the conditions of his contract of employment, where benefits have been promised and conferred on him by his employer as an inducement for the continuance of his service to the employer, and where such employee reaches the specified retirement age, he acquires a vested right to those benefits. *Sheehy* v. *Seilon, Inc.* 10 Ohio St. 2d. 242, 227 N.E.2d. 229 (1967). See also, *Matter of Erie Lackawanna Railway Co.*, 548 F.2d 621 (6th Cir. 1977). Once an employee acquires such a vested right, forfeiture of that right is not favored either in equity or at law. *Webster* v. *Dwelling House Insurance Co.* 53 Ohio St. 558, 563, 42 N.E. 546, 547 (1895).

Analysis of the Pension Plan

Part II of the pension plan contains the complete text of the plan as in effect January 1, 1970. The first pertinent section is entitled "Normal Retirement Benefits". This section provides as follows:

> 4. The normal retirement date is the first day of the month next following the employee's 65th birthday, *if the employee is then in the active employ of the company.*
>
> 5. An employee will be eligible to retire on his normal retirement date provided he has completed 15 or more years of continuous service. (Emphasis supplied).

It is clear from the language of the plan itself that an employee must be in the active employ of the company at

the time he reaches the age specified for normal retirement and must also have 15 or more years of continuous service. This is consistent with the "Coverage" section (paragraph 2) which provides for the coverage of persons *employed by* the company. (Emphasis supplied).

The term "years of service" is defined in paragraph 9 as follows:

> "Years of service" means completed years of continuous service *from date of employment to actual or normal retirement date,* but in no event beyond normal retirement date. (Emphasis supplied).

Paragraphs 12 and 13 indicate that leaves of absence exceeding nine months in duration and layoffs exceeding nine months in duration will break continuous service. Paragraph 14 indicates that, if an employee leaves the service of the company and then is subsequently re-employed, the date of re-employment will be used in determining his continuous service. Paragraphs 9, 12 and 13 are consistent with each other in requiring that the employee be in the active employ of the company from the date of employment to the date of retirement in order to qualify for the pension.

The next pertinent section is entitled "Computation of Average Monthly Earnings". This section provides:

> "Average Monthly Earnings" means the employee's average monthly base pay for the five year period ending on December 31st *prior to his actual or normal retirement date,* excluding overtime compensation, premium pay and any other extra remuneration. (Emphasis supplied).

This section contemplates that the employee will be in the employ of the company for the five year period leading up to retirement. Thus, it is consistent with the requirement

that the employee be in the active employ of the company at the time of retirement.

The plan provides for a disability pension under the following circumstances.

> If an employee becomes permanently and totally disabled *during active employment with the company,* when he is age 45 or more and has 15 or more completed years of continuous service at the time he becomes disabled, he will be eligible to be retired on a disability pension. (Emphasis supplied).

This section requires that the employee be employed with the company at the time he becomes permanently and totally disabled in order to receive benefits. This is consistent with paragraph 9, which defines "Years of Service" to mean completed years of continuous service from the date of employment to actual or normal retirement date.

The method of determining the amount of disability pension is similar to the method of determining early retirement benefits. This is another indication that the plan contemplates that the beneficiary be in the employ of the company at the time of early retirement.

Regarding early retirement benefits, paragraph 23 provides that an employee can retire early provided he is at least 55 years of age and has completed 15 or more years of continuous service. As stated above, "years of service" is defined in paragraph 9 as service from date of employment to actual or normal retirement date. This is a clear indication that the plan contemplates an employee being employed on a continuous basis for a period of 15 years up to and including the date of retirement. This is further supported by paragraph 24 which states:

> An employee may apply for early retirement for reasons other than permanent and total disability with

> the understanding that he will not engage in any occupation in competition with or detrimental to the business of the Company or any of its branches, subsidiaries or affiliated companies.

By restricting future employment of a retiree, paragraph 24 clearly contemplates that the employee will be employed by the company at the time he applies for retirement.

Paragraph 25 sets forth the computation for early retirement benefits. The first step is as follows:

> (a) Determine the amount applicable to the employee's *years of service* and average monthly earnings for the five year period prior to the date of early retirement in accordance with the applicable table set forth at the end hereof. (Emphasis supplied).

This section refers to an employee who has been employed continuously up to and including his retirement date. because the term "years of service" is defined in paragraph 9 as years of continuous service from the date of employment to actual or normal retirement date.

Thus, all of the above-mentioned sections of the pension plan are consistent with one another in requiring that an employee be in the active employ of the company at the time he meets the conditions for early retirement.

Analysis of Applicable Law

With respect to whether employees may acquire a vested right in the pension provided for by the plan, two paragraphs are relevant. Paragraph 30 provides:

> Nothing in this pension plan in itself shall give any employee the right to be retained in the employ of the company.

> Nothing in this pension plan in itself shall give any employee the right to be retained in the employ of the company.
>
> Paragraph 32 provides:
>
> The company has every intention of continuing the plan indefinitely, however, should unforeseen events occur in the future, the company reserves the right to modify or terminate the plan.

Thus, the pension plan in this case is not a contract of employment, i.e., no one is entitled to a job by reason of the pension plan and no obligation to any particular individual comes into existence from it alone. See ¶ 30 of the Pension Plan; *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944).

Those courts which have had occasion to consider the issue herein presented have determined that an employee who has not met all of the requirements of the pension plan at the time the company closes its plant is not eligible for retirement benefits. In *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972), employees at a plant in Toledo, Ohio were terminated as a result of the closing of the plant. They sued to recover pension benefits under a plan which provided that "in order to qualify for a pension, an employee must have attained the age of 40 years and must have had ten years of accredited service." 456 F.2d at 373. The court held that, in order to be eligible for deferred pension benefits at age 65 under the plan, the employees must have attained 40 years of age and must have completed 10 years of service at the time the plant closed it operation. See also, *International Union, United Steel Workers Union No. 2098* v. *International Systems and Controls Corp.*, 566 F.2d 1135 (10th Cir. 1977); *Craig* v. *Bemis Co.*, 517 F.2d 677 (5th Cir. 1975); *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128 (3rd Cir. 1972), *cert. denied*,

409 U.S. 1126 (1973); *Finnell* v. *Cramet Inc.*, 289 F.2d 409 (6th Cir. 1961); *Wallace* v. *Northern Ohio Traction & Light Company*, 57 Ohio App. 203, 13 N.E.2d 139 (Ct. of App. 1937); *Taint* v. *Kroger Company*, 20 Ohio Misc. 29, 247 N.E.2d 794 (Common Pleas 1967); *Cantor v Berkshire Life Insurance Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960).

It is not appropriate to look beyond the four corners of the contract unless the Court finds the contract to be ambiguous. A contract is not rendered ambiguous under the law by the mere fact that the parties may not agree on the proper construction of it. *Elbow Lake Co-op Grain Co.* v. *Commodity Credit Corp.*, 251 F.2d 633 (8th Cir. 1958).

CONCLUSION

Although both Plaintiffs and Defendant have filed a number of affidavits concerning the understanding of various individuals as to the terms of the pension plan, it is unnecessary to consider these affidavits insofar as the Court finds the terms of the pension plan to be clear on the face of the plan itself. Therefore, the obligations of the parties exist as stated by the plan and not as stated by any particular individual in an affidavit filed with this court. See *Hotchkiss* v. *National City Bank*, 200 F. 287, 293 (S.D. N.Y. 1911), *aff'd* 201 F. 664 (2nd Cir. 1912), *aff'd* 231 U.S. 50 (1913).

At the time of the closing of Defendant's Dayton, Ohio plant, none of Plaintiffs had reached the specified age for early retirement. Their employment was terminated through no fault of their own by an event unforeseen to them. All Plaintiffs had 15 or more years of continuous service and would have been eligible for early retirement but for the fact that they had not attained the requisite age.

It may seem unfair to deny an employee who is not at fault the fruits of 15 or more years labor to which he would have been entitled at a later time but for the closing of the plant. The Court is sympathetic with the plight of Plaintiffs. However, the extent of the benefits of the pension plan are clearly limited by the terms of the plan itself. See *Jacoby* v. *Grays Harbor Chair & Manufacturing Co.*, 77 Wash.2d 911, 918, 468 P.2d 666, 672 (1970). An employment relationship does not extend beyond the actual termination of employment. An employee who has not achieved both the requisite age and length of service as of the date of termination is not entitled to a pension. *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972). Thus, under the law, the Court cannot find that Plaintiffs are entitled to benefits under the pension plan in question.

Plaintiffs Motions for Summary Judgment are DENIED.

Defendant's Cross-Motion for Summary Judgment is GRANTED.

Dated: June 8, 1979 /s/ CARL B. RUBIN

CARL B. RUBIN
United States District Judge

No. 85-3782
No. 85-3783

United States Court of Appeals

For The Sixth Circuit

KAY APPONNI, ET AL.,
CLASS ACTION,
Plaintiffs-Appellees,
Cross-Appellants,
vs.
SUNSHINE BISCUITS, INC.,
Defendant-Appellant,
Cross-Appellee

ORDER

Upon consideration of the petition for rehearing submitted by the appellant, cross-appellee,

IT IS ORDERED that the petition be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

Dated: February 20, 1987

[This Page Intentionally Left Blank]

SUPREME COURT, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SUNSHINE BISCUITS, INC.,

Petitioner,

v.

KAY APPONI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Asher Bogin
Counsel of Record

BOGIN & PATTERSON
1200 Talbott Tower
131 N. Ludlow Street
Dayton, Ohio 45402
(513) 226-1200

Attorney for Respondents

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

Respondent is not satisfied with the questions as presented by Petitioner and suggests the following single question instead:

> In an action to recover pensions under a collectively bargained pension plan, where the interpretation of the plan is affected by an estoppel created by representations made by the employer during labor negotiations, did the Court below err in applying a state statute of limitations for breach of contract.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	I
TABLE OF AUTHORITIES	III
STATUTORY PROVISION INVOLVED	VI
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Acri v. *International Association of Machinists*, 781 F.2d 1393 (9th Cir., 1986)	8
Adams v. *Gould, Inc.*, 739 F.2d 858 (3rd Cir., 1984) reh. den. 7/25/84	7
Andres v. *Teamsters Local 600*, 724 F.2d 73 (8th Cir., 1983)	8
Apponi v. *Sunshine Biscuits, Inc.*, 652 F.2d 643 (6th Cir. 1981)	6
Apponi v. *Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987)	4, 5, 6, 8, 9
Auto Workers v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966)	*passim*
Byrne v. *Buffalo Creek Railroad Company*, 765 F.2d 364 (2d Cir., 1985)	8, 9

Page

Cohen v. *Martin's*,
694 F.2d 296 (2nd Cir., 1982) 7

DelCostello v. *International Brotherhood of Teamsters*,
462 U.S. 151 (1983) ..... *passim*

Edwards v. *Teamsters Local Union 36*,
719 F.2d 1036 (9th Cir., 1983) cert. den. ____ U.S.
____, 104 S.Ct. 1599 8

Federation of Westinghouse Indepedent Salaried Unions v. *Westinghouse Electric Corp.*, 736 F.2d 896 (3d Cir. 1984) 2

International Association of Machinists v. *Allied Products Corp.*, 786 F.2d 1561 (11th Cir. 1986) 2

International Union, UAW v. *Hoosier Cardinal Corp.*,
338 U.S. 696 (1966) 4

Jameson v. *Bethlehem Steel Corp. Pension Plan*,
765 F.2d 49 (3d Cir., 1985) 7

Jenkins v. *Local 705, International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir., 1983) 7

Jones v. *Consolidated Freightways Corp. of Delaware*,
776 F.2d 1458 (10th Cir., 1985) 8

Kelley v. *International Brotherhood of Electrical Workers*, 803 F.2d 516 (9th Cir., 1986) 8

Martin v. *Bankers Trust Co.*,
565 F.2d 1276 (4th Cir., 1977) 7

McCreedy v. *Local Union No. 971*,
809 F.2d 1232 (6th Cir., 1987) 2, 3, 4

Miles v. *New York State Teamsters Conference*,
698 F.2d 593 (2d Cir., 1983), cert. den. ____ U.S.
____, 104 S.Ct. 105 7

Murray v. *Branch Motor Express Co.*,
723 F.2d 1146 (4th Cir., 1983) 8

Page

Paris v. *Profit Sharing Plan*,
637 F.2d 357 (5th Cir., 1981), cert. den., 454 U.S.
836 (1981) 7

Perez v. *Dana Corp.*,
718 F.2d 581 (3d Cir., 1983) 8

Peterson v. *Kennedy*,
771 F.2d 1244 (9th Cir., 1985) 8

Quinn v. *County Club Soda*,
639 F.2d 838 (1st Cir., 1981) 7

Reiherzer v. *Shannon*,
581 F.2d 1266 (7th Cir., 1978) 7

Sethre v. *Washington Education Association*,
22 Wash. App. 666, 591 P.2d 838, review den., 92
Wash. 2d 1020 (1979) 7

Smith v. *General Motors Corp.*,
747 F.2d 372 (6th Cir., 1984) 8

Teamsters Union Local 315 v. *Great Western Chemical Co.*, 781 F.2d 764 (9th Cir. 1986) 2

Van Fossan v. *International Brotherhood of Teamsters*, 649 F.2d 1243 (7th Cir., 1981) 7

Welyczko v. *U.S. Air, Inc.*,
733 F.2d 239 (2d Cir.) cert. den., ____ U.S. ____,
105 S.Ct. 512 (1984) 8, 9

Winer v. *Edison Brothers Stores Pension Plan*,
593 F.2d 307 (8th Cir., 1979) 7

Woodfork v. *Marine Cooks & Stewards Union*,
642 F.2d 966 (5th Cir., 1981) 7

STATUTORY PROVISIONS

29 U.S.C. § 160(b) 4

29 U.S.C. § 185(a) 3

29 U.S.C. § 1132(a)(1) 6

STATUTORY PROVISION INVOLVED

In addition to the statute set forth in the Petition herein, Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1), which is set forth in full below, is also involved:

A civil action may be brought:

(1) by a participant or beneficiary.

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

No. 86-1841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SUNSHINE BISCUITS, INC.,

Petitioner,

v.

KAY APPONI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

There is no conflict among or within the Circuit Courts of Appeals with respect to the interpretation of, or the distinction between, the decisions of this Court in *DelCostello* and *Hoosier Cardinal* on the question of what statute of limitation to apply in actions under Section 301 of the LMRA; to the contrary, the Courts of Appeals have followed not only the letter but the spirit of both cases. Unless it is intended to overrule *DelCostello* and *Hoosier Cardinal*, therefore, there is no reason for intervention of this Court in the present case.

Even if it is intended to overrule the decisions in *DelCostello* and *Hoosier Cardinal*, this case presents a ques-

tionable vehicle for such change because the statute of limitations issue under Section 301 of the LMRA is not reached unless three other major issues, extraneous to the question presented, are first decided adversely to Respondents: (1) whether a defense under Section 301 survived the failure to plead or raise it timely; (2) whether the statute of limitations question in this action to recover pensions is governed by LMRA or by ERISA and, if ERISA, what limitation period should apply; and (3) whether *DelCostello* should in any event be applied retroactively to a cause of action which arose some time before the filing of this action in 1977.

ARGUMENT

Petitioner asks this Court to grant the writ it seeks so that claimed inconsistencies among the Courts of Appeals in the application of the decisions of this Court in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and *Auto Workers* v. *Hooser Cardinal Corp.*, 383 U.S. 696 (1966), may be resolved. Petitioner claims that "among, and even within, the Courts of Appeals, confusion reigns," and that the relationship between the two cases "has resulted in a maze of appellate decisions with no readily discernible pattern."

Petitioner seeks to show this reigning confusion by noting that some circuit court decisions have applied state contract statutes of limitations to "straightforward" Section 301 suits, whereas in four cases (*Federation of Westinghouse Independent Salaried Unions* v. *Westinghouse Electric Corp.*, 736 F.2d 896 (3d Cir. 1984); *Teamsters Union Local 315* v. *Great Western Chemical Co.*, 781 F. 2d 764 (9th Cir. 1986); *International Association of Machinists* v. *Allied Products Corp.*, 786 F.2d 1561 (11th Cir. 1986); *McCreedy* v. *Local Union No. 971*, 809 F.2d 1232 (6th Cir. 1987) (the "Four Appellate Cases"), the Courts of Appeals applied the *DelCostello* six-month statute.

Actually, however, the decisions in the Four Appellate Cases demonstrate a consistent and reasonable interpretation of the meaning of, and relationship between, the *DelCostello* and *Hoosier Cardinal* decisions. All of the Four Appellate Cases involve actions to compel arbitration under collective bargining contracts. The basis of all four of those decisions is that an action to compel arbitration is more like a hybrid breach of agreement/unfair representation case (as in *DelCostello*) than a simple contract action brought by a union to recover vacation pay (as in *Hoosier Cardinal*). None of those cases holds that the six months statute applies in all suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), or that it should apply in a Section 301 suit to recover only money benefits.

The instant case is a suit to recover pay under a pension plan which is incidental to, but not directly a part of, a collective bargaining contract.

The Four Appellate Cases apply the *DelCostello* reasoning to suits to compel arbitration. Those decisions are based upon the important place of provisions for arbitration of disputes in the federal scheme for regulation of labor relations. As stated by the Sixth Circuit in *McCreedy* (which cites with approval the other three of the Four Appellate Cases),

> "Arbitration is a policy at the heart of federal labor law, which has been, and will continue to be greatly favored by the courts. To delay its occurrence by applying a six or twenty year state statute of limitations applicable to oral or written contracts would defeat its purpose — the speedy resolution of disputes." *McCreedy* at 1237.
>
> * * *
>
> "Unlike the claim involved in *Hoosier Cardinal*, an action to compel arbitration is not readily analogous to a traditional breach of contract where damages are sought. Unlike most contracts, collective bargaining agreements establish a grievance resolution process in order to insure a smoothly functioning labor-

> management relationship. Efficiency is a fundamental concern of both union and management . . . . Here, the union seeks only to enforce the grievance and arbitration procedures so essential to the smooth operation of the process." *McCreedy* at 1238.

Earlier in the decision, the Court had noted the distinction drawn in *DelCostello* between that decision and *Hoosier Cardinal*. The Court said, referring to *DelCostello*:

> "There, the Court clearly distinguished *International Union, UAW* v. *Hoosier Cardinal Corp.*, 338 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966), reasoning that when a case involves 'those consequential processes that federal law is chiefly designed to promote — the formation of the collective bargaining agreement and the private settlements of disputes under it,' national uniformity is of greater importance."

Petitioner points out that *McCreedy* and the present case (*Apponi* v. *Sunshine Biscuits, Inc.*, 809 F.2d 1210) (6th Cir. 1987) ("*Apponi II*") were decided by the Sixth Circuit eight days apart and reached different conclusions as to whether the six months limitation period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or the state six or fifteen year, statute of limitations should apply. Petitioner seems to take that as evidence of a conflict of opinion within the Sixth Circuit (Petition herein at 13). In fact, there is no such conflict; on the contrary, *McCreedy* and *Apponi II* provide good examples of cases in which the Court of Appeals reconciled and followed the reasoning in both *DelCostello* and *Hoosier Cardinal*. On the one hand, the action to compel arbitration in *McCreedy* was held to be subject to the NLRB Section 10(b) six months limitations, the Court noting that:

> "Just as the employee's unfair representation claim is a creature of labor law, so too, we believe, is a union's action to compel arbitration." *McCreedy* at 1238.

On the other hand, the action to recover pensions was held in *Apponi II*, the instant case, to be governed by the state contract statute of limitations, the Court noting that this case is more like *Hoosier Cardinal* than *DelCostello*. Petitioner's Appendix at A-7.

No case is cited by Petitioner (and none is found by Respondents) which holds that the six months NLRA Section 10(b) statute of limitations should apply, rather than a state contract statute of limitations, to an action to recover money benefits under a union contract as in *Hoosier Cardinal* or a pension plan as in the instant case.

If it is the intention of this Court that the six month statute of limitations apply in cases like *DelCostello* which go to the heart of the federal interest in employer/union/employee relations, but that state statutes of limitations continue to govern cases like *Hoosier Cardinal* which seek simply the recovery of money benefits under a union contract, then this case, which falls squarely into the latter category, does not raise any issue which would require resolution by this Court.

Even if it were the intention of this Court to abandon both *DelCostello* and *Hoosier Cardinal*, and to hold that the six months statute of limitations contained in Section 10(b) of the National Labor Relations Act is applicable to an action under Section 301 to recover money benefits under a labor agreement, this case is not a good vehicle for such change because the statute of limitations issue under Section 301 of the LMRA is not reached unless three other questions, extraneous to the questions presented, are first decided adversely to Respondents:

(1) Whether a defense under Section 301 survived the failure to plead or raise it timely.

As the Court of Appeals found in *Appoini II*, Petitioner did not raise the argument that this action arises under Section 301 in a timely manner. (Petitioner's Appendix at A-5). It was

neither pleaded in Petitioner's Answer nor otherwise raised at any time prior to the first Court of Appeals decision in this case (*Apponi* v. *Sunshine Biscuits Inc.*, 652 F.2d 643) (6th Cir. 1981) ("*Apponi I*").

In order to reach the question of what statute of limitations should be applied under Section 301 in this case, therefore, the Court would first have to decide that Petitioner's defense of statute of limitation under Section 301 survived Petitioner's failure to have pled it or raised it prior to the decision in *Apponi I*.

The Court in *Apponi II* declined to hold that Petitioner's failure to have pled or previously raised the defense of the statute of limitations under Section 301 barred the defense, apparently on the ground that this is a Section 301 case (Petitioner's Appendix at A-5).

If that holding is erroneous (as Respondents would urge), then the defense of statute of limitation under Section 301 has been waived and the questions presented in the Petition are not reached.

(2) Whether the statute of limitations question in this action to recover pensions is governed by LMRA or by ERISA; and, if ERISA, what limitation period should apply.

Section 502(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1), authorizes a civil action by a pension plan participant or beneficiary to recover benefits under the plan.

Respondents' employment by Petitioner was terminated, and the misrepresentations which gave rise to the claimed estoppel in this case were made, prior to the enactment of ERISA in 1974. Respondents were all under the early retirement age of 55, however, when their jobs were ended, and do not claim to have been eligible for pensions in any view of the case until after they reached the age of 55.

Several Courts of Appeals have held that, although the substantive provisions of ERISA are inapplicable when the acts or omissions complained of occurred before ERISA, nevertheless, where the actual payment of benefits was not due, and claims for benefits, therefore, could not effectively have been made, until after the enactment of ERISA, the procedural provisions of ERISA apply. See, e.g., *Reiherzer* v. *Shannon*, 581 F.2d 1266 (7th Cir., 1978); *Cohen* v. *Martin's*, 694 F.2d 296 (2nd Cir., 1982); *Van Fossan* v. *International Brotherhood of Teamsters*, 649 F.2d 1243 (7th Cir., 1981); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir., 1981); *Paris* v. *Profit Sharing Plan*, 637 F.2d 357 (5th Cir., 1981), cert. den., 454 U.S. 836 (1981); *Winer* v. *Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir., 1979); *Jameson* v. *Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir., 1985). See also, *Sethre* v. *Washington Education Association*, 22 Wash. App. 666, 591 P.2d 838, review den., 92 Wash. 2d 1020 (1979). But see, *Martin* v. *Bankers Trust Co.*, 565 F.2d 1276 (4th Cir., 1977); *Quinn* v. *Country Club Soda*, 639 F.2d 838 (1st Cir., 1981).

If the Courts of Appeals which have applied ERISA procedural provisions in the pre-ERISA cases noted above are correct, the statute of limitations under ERISA would seem to apply to this action to recover pensions rather than the statute of limitations as it may be found under Section 301 of the Labor Management Relations Act.

Several Courts of Appeal have held that, since ERISA does not contain any general statute of limitations applicable to actions by beneficiaries or participants to recover pension benefits, the most appropriate state statute of limitations should be applied. *Jenkins* v. *Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir., 1983); *Miles* v. *New York State Teamsters Conference*, 698 F.2d 593 (2d Cir., 1983), cert. den. ____ U.S. ____, 104 S.Ct. 105. See also *Adams* v. *Gould, Inc.*, 739 F.2d 858 (3d Cir., 1984), reh. den. 7/25/84.

If those decisions are sound, the decision in *Apponi II* applying an Ohio contract statute of limitations is correct.

(3) Whether DelCostello should in any event be applied retroactively to a cause of action which arose some time prior to the filing of this action in 1977.

Although some Courts of Appeals have held simply that the *DelCostello* decision applies retroactively to all suits under Section 301 pending at the time of the decision (see, e.g., *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir., 1984); *Andres* v. *Teamsters Local 600*, 724 F.2d 73 (8th Cir., 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir., 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3d Cir., 1983)), the Courts of Appeals in at least three circuits have held that *DelCostello* should not be applied retroactively to bar actions such as the present one.

The Ninth Circuit has held in several cases that *DelCostello* should be applied retroactively where to do so will extend the statutory period, but should not be applied retroactively so as to bar a suit which was timely under the appropriate state statute when filed or which was filed within six months after the date of the *DelCostello* decision. *Peterson* v. *Kennedy*, 771 F.2d 1244 (9th Cir., 1985); *Edwards* v. *Teamsters Local Union 36*, 719 F.2d 1036 (9th Cir., 1983), cert. den. ____ U.S. ____, 104 S.Ct. 1599; *Acri* v. *International Association of Machinist*, 781 F.2d 1393 (9th Cir., 1986); *Kelley* v. *International Brotherhood of Electrical Workers*, 803 F.2d 516 (9th Cir., 1986).

The Tenth Circuit has held that *DelCostello* should not be applied retroactively to shorten the limitation period. *Jones* v. *Consolidated Freightways Corp. of Delaware*, 776 F.2d 1458 (10th Cir., 1985).

The Second Circuit first applied *DelCostello* retroactively. *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), cert. den., ____ U.S. ____, 105 S.Ct. 512 (1984). Later, however, the Second Circuit declined to apply *DelCostello* retroactive-

ly. *Byrne* v. *Buffalo Creek Railroad Company*, 765 F.2d 364 (2d Cir., 1985). The Court in *Byrne* distinguished *Welyczko* because *Byrne* presented:

> ". . . the rare question in this circuit, of whether a litigant should be deprived, after ten years of litigation, of a judgment for wrongful discharge and unfair representation because during litigation delays, for which the district court must bear the major responsibility, the Supreme Court changed the law regarding the applicable statute of limitations for the bringing of his suit." *Byrne* at 365.

The Court concluded:

> "Here, there has been nearly ten years of costly litigation and a full trial on the merits which resulted in a determination that Byrne is entitled to damages. These extraordinary circumstances compel us to carve out a limited exception to our holding in *Welyczko* that *DelCostello* applies retroactively."

The distinguishing facts in *Byrne* are strikingly similar to the facts in the present case: *Apponi* is a pension case begun in 1977, tried to a jury in 1982, appealed to the Sixth Circuit Court of Appeals three times, and still pending in 1987 with the end nowhere in sight.

Whether ruled upon explicitly, whether left unmentioned, or whether dealt with in some other fashion, a holding by this Court that the Respondents' claims are barred by the six months statute of limitations would seem necessarily to include holdings that the defense of statute of limitations under Section 301 survived Respondent's failure to raise it timely; that Section 301 of LMRA rather than ERISA determines the applicable statute of limitations in this action to recover pensions; and that *DelCostello* should be applied retroactively to

this suit which was filed six years before *DelCostello* and which has been in the federal courts ever since.

CONCLUSION

The decision below follows the decision of this Court in *Hoosier Cardinal* and distinguishes this case from *DelCostello* in essentially the same way that this Court in *DelCostello* distinguished *Hoosier Cardinal*. The Court of Appeals cases cited by Petitioner, although reaching varying results, are not in conflict, as Petitioner claims, but reach different results based upon the distinctions made by this Court. This case, therefore, presents no issue which requires intervention of this Court.

Even if this Court chooses to extend *DelCostello* so as to subject a simple action for money benefits under a union-negotiated pension plan to the six month statute of limitations of Section 10(b) of the NLRA, that issue is clouded in this case by questions of waiver of defenses, of application of ERISA, and of retroactivity of judicial decision.

The Petition for Certiorari should be denied.

Respectfully submitted,

Asher Bogin
Counsel of Record

BOGIN & PATTERSON
1200 Talbott Tower
131 N. Ludlow Street
Dayton, OH 45402
(513) 226-1200

Attorney for Respondents